Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that, notwithstanding the all-encompassing grant of bankruptcy jurisdiction set forth in 28 U.S.C. § 1334, the district and bankruptcy courts lack jurisdiction over bankruptcy claims against a federal agency merely because, absent bankruptcy, review of the agency's actions may be subject to the exclusive jurisdiction of another court.

2. Whether the court of appeals erred in holding that, even in legal proceedings to which a federal agency is a party, courts must defer to the agency's litigating position expressing a *post hoc* interpretation of the agency's own contractual obligations.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All of the parties to the proceedings in the court of appeals are listed in the caption of this petition. NextWave Personal Communications Inc. is a wholly-owned subsidiary of NextWave Telecom Inc. Neither entity is a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NextWave Personal Communications Inc. ("NextWave") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 200 F.3d 43. The opinion of the district court (App., *infra*, 40a-56a) is reported at 241 B.R. 311. The opinions of the bankruptcy court (App., *infra*, 57a-161a) are reported at 235 B.R. 263, 235 B.R. 272, 235 B.R. 277, 235 B.R. 305, and 235 B.R. 314.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1999. A timely petition for rehearing was denied on February 10, 2000. App., *infra*, 162a. On May 5, 2000, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including June 9, 2000. *See* Appl. No. 99A892. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Bankruptcy Code, the Hobbs Act, the Federal Communications Act ("FCA"), and Federal Communications Commission regulations are reproduced at App., *infra*, 167a-207a.

STATEMENT OF THE CASE

This case involves a court of appeals' evisceration of what may be the most comprehensive jurisdictional grant in the United States Code: Congress's vesting of jurisdiction in the bankruptcy and district courts to hear *all* proceedings arising under the Bankruptcy Code or related to a bankruptcy case, "*[n]otwithstanding any Act*

of Congress that confers exclusive jurisdiction on a court or courts other than the district courts." 28 U.S.C. § 1334(b) (emphasis added); *see also* 28 U.S.C. § 157. The decision below holds that the bankruptcy and district courts lack jurisdiction to apply the Bankruptcy Code's fraudulent conveyance provision, 11 U.S.C. § 544, to reduce NextWave's $4.7 billion debt to the Federal Communications Commission ("FCC"). Notwithstanding the unambiguous and sweeping language of Section 1334(b) and related jurisdictional provisions, the court of appeals reasoned that "jurisdiction over claims brought against the FCC in its regulatory capacity lies *exclusively* in the federal courts of appeals." App., *infra*, 21a (emphasis added).

The court of appeals' conclusion is flatly contradicted by Section 1334(b) and related jurisdictional provisions. *See* 11 U.S.C. § 106(a)(2) ("The [bankruptcy] court may hear and determine *any issue* arising with respect to the application of [Section 544] to governmental units.") (emphasis added); 28 U.S.C. § 157(b)(2)(H) (granting bankruptcy court jurisdiction over "proceedings to determine, avoid, or recover fraudulent conveyances"). The court of appeals' nullification of these bankruptcy jurisdictional statutes also conflicts with the decisions of other courts of appeals. Unlike the Second Circuit, these other courts have given full effect to the Bankruptcy Code's governing jurisdictional statutes, and have recognized correctly that these statutes confer bankruptcy jurisdiction even over proceedings that would normally be subject to the exclusive jurisdiction of another court. *See, e.g., Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995); *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987).

The decision below effectively nullifies the jurisdictional and substantive foundations underlying Congress's carefully crafted bankruptcy scheme. If the bankruptcy and district courts lack jurisdiction to en-

force the provisions of the Bankruptcy Code here, it follows that those courts lack jurisdiction over a wide array of debtor-creditor proceedings involving regulatory agencies. Such a result invites a flood of litigation as agencies of all types seek to take advantage of their newfound immunity.

Indeed, the Second Circuit has already expanded its jurisdictional ruling in a subsequent opinion, holding that the bankruptcy courts have no jurisdiction to enforce or apply other provisions of the Bankruptcy Code against the FCC in NextWave's bankruptcy proceedings, including not only the automatic stay prescribed by 11 U.S.C. § 362, but also other provisions bearing on NextWave's efforts to reorganize. *See In re FCC*, No. 99-5063, 2000 U.S. App. LEXIS 11615 (2d Cir. May 25, 2000). Unless overturned by this Court, the decision below will engender widespread confusion regarding the hitherto unquestioned scope of bankruptcy jurisdiction, and create a massive jurisdictional loophole for federal agencies seeking to avoid bankruptcy-related claims asserted against them by debtors in bankruptcy.

In addition to its jurisdictional ruling, the court of appeals also determined that the question whether NextWave's obligation to the FCC could be reduced in accordance with Section 544 should be resolved by reference to the FCC's interpretation of its own contractual commitments *supplied after the fact and during litigation*. App., *infra*, 27a-33a. The question of the disposition of NextWave's obligation under Section 544 is properly an issue of bankruptcy law, however, and the court of appeals' decision to defer to the FCC on this issue conflicts irreconcilably with the decisions of other courts of appeals establishing that, in resolving legal disputes involving a federal agency, no deference is due to the agency's self-serving interpretations of its own contractual obligations generated during the course of the litigation. Accordingly, the Court should grant certiorari to review these important questions.

A. Factual Background

In May and July of 1996, NextWave was the high bidder for 63 "C-Block" licenses auctioned by the FCC. The licenses cover specified portions of the electromagnetic spectrum suitable for personal communication services ("PCS"). NextWave's high bids totaled $4.7 billion. App., *infra*, 3a-5a.

Although NextWave was the high bidder for these licenses, the licenses could not be granted until completion of the application and approval process. Pending completion of that process, NextWave was required to and did place deposits with the FCC equaling 10 percent of its total bid amount (approximately $474 million). Following the bidding, the FCC did not approve NextWave's license applications until January 1997, and did not actually issue the licenses to NextWave until February 1997. App., *infra*, 5a-6a.

When the licenses were finally issued, NextWave executed promissory notes to the FCC for the balance of the $4.7 billion purchase price. Under the terms of the notes and applicable FCC regulations, NextWave was obliged to pay the notes in installments over a ten-year term, with interest only to be paid during the first six years. *See* 47 C.F.R. §§ 1.2110(f), 24.711(b) (1996).

In the months between NextWave's successful bid for its licenses and the actual issuance of the licenses in February 1997, the FCC held auctions for nearly *1500 additional* PCS licenses. App., *infra*, 71a. The prices for these licenses were dramatically lower than the prices for the C-Block licenses, averaging less than 25 percent of the C-Block bids. *Id.* at 7a n.4.

Because of this precipitous drop in the market value of the licenses, a significant number of C-Block license holders were unable to obtain the financing necessary to make their installment payments and build out their PCS networks. During 1997, the second and third largest C-Block license holders—Pocket Communications and

GWI PCS1-14, Inc.—filed for bankruptcy protection. *See* Carolyn Hochstadter Dicker, *PCS Licenses and the "Specter" of Bankruptcy*, 6 COMMLAW CONSPECTUS 59, 59 (1998).

On June 8, 1998, before its first installment payment was due to the FCC, NextWave likewise commenced its bankruptcy case under Chapter 11 of the Bankruptcy Code. By that time, NextWave had expended not only the $474 million already paid to the FCC, but also approximately $100 million on the build-out and pre-activation phase of its network development plan. It owed thousands of creditors in excess of $400 million.

B. The Bankruptcy Litigation

When it filed for Chapter 11 protection, NextWave also filed an adversary proceeding against the FCC in bankruptcy court under one of the fraudulent conveyance provisions of the Bankruptcy Code, 11 U.S.C. § 544. Section 544 allows a trustee (or debtor in possession in a Chapter 11 case) to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor" to the extent that the debtor's creditors could have avoided the transfer or obligation under applicable nonbankruptcy law. 11 U.S.C. § 544(b)(1). NextWave's complaint in the adversary proceeding alleged that NextWave's promissory-note obligations were avoidable as fraudulent conveyances because by the time the FCC actually issued the licenses to NextWave in exchange for the notes, the licenses were worth far less than the $4.74 billion that NextWave had bid for them some seven to nine months earlier.[1]

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[1] Prior to NextWave's bankruptcy filing, another large C-Block license holder, GWI, had successfully invoked the fraudulent conveyance provisions of the Bankruptcy Code to reduce the amount of its obligations to the FCC. On June 4, 1998, the bankruptcy court avoided more than $900 million

After a trial, the bankruptcy court entered judgment for NextWave, reducing NextWave's indebtedness under the notes to $1.023 billion, the fair market value of the licenses as of February 19, 1997—when NextWave "complied with its purchase price obligation by delivering the Notes" and incurred its obligation to pay for the licenses in full. App., *infra*, 112a, 117a-134a. The FCC appealed to the district court, which affirmed the bankruptcy court's judgment. *Id.* at 40a-56a.

C. Proceedings In The Second Circuit

The Second Circuit reversed. App., *infra*, 1a-39a. In spite of NextWave's express reliance on the broad grant of bankruptcy jurisdiction conferred by 28 U.S.C. § 1334 (*see* Pet. C.A. Br. 14-16), the court of appeals held that bankruptcy courts lack jurisdiction to adjudicate actions against the FCC arising under Section 544. App., *infra*, 13a-24a. The court reasoned that NextWave's obligation to pay the full bid amount for the licenses was "regulatory" in nature, and thus subject to the exclusive jurisdiction of the courts of appeals authorized to review FCC licensing decisions pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. App., *infra*, 21a.

The court of appeals also proceeded to address and reverse the bankruptcy and district courts' finding of a constructive fraudulent conveyance. App., *infra*, 24a-38a. The court concluded that NextWave's purchase-price obligations were incurred at the close of the auctions, rather than when the licenses were subsequently

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of GWI's payment obligations to the FCC pursuant to 11 U.S.C. § 548. *See United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 61 (N.D. Tex. 1999), *appeal pending*, No. 99-11294 (5th Cir.). A fraudulent conveyance action involving Pocket Communications' C-Block licenses is still pending as well. *See In re Pocket Communications, Inc.*, No. 97-54105-SD (Bankr. D. Md. Nov. 12, 1999).

granted (and the promissory notes executed and delivered) many months later. *Id.* at 25a.

The court's determination that NextWave's obligations were incurred at the close of the auctions was "based on the FCC's interpretation of its own regulations, to which courts owe deference." App., *infra*, 27a. The court concluded that, even though the FCC had issued its interpretation after the fact and during the course of its litigation with NextWave, deference was due to the FCC's interpretation as long as the FCC was acting at least "in part as a regulator" (*i.e.*, not "as creditor only") when it proffered the interpretation. *Id.* at 31a-32a.[2]

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[2] During the pendency of its bankruptcy petition, NextWave, as a result of its extensive financing efforts and significant improvements in PCS spectrum market conditions, has raised sufficient capital to pay in full for its licenses, emerge from bankruptcy, and proceed expeditiously to offer its PCS network to consumers. NextWave has thus offered to pay the FCC *in full* for its licenses and to satisfy the claims of all other creditors. Implementation of this proposed plan would fulfill Congress's goals in enacting the Bankruptcy Code and in mandating that portions of the PCS spectrum be auctioned to small and entrepreneurial businesses. Notwithstanding NextWave's ability and willingness to satisfy in full its purchase-price obligations, however, on January 12, 2000, the FCC rejected that offer, and asserted *for the first time* that NextWave's licenses "automatically canceled" at an unspecified date more than a year earlier. Moreover, the FCC scheduled a public auction of those and other licenses for a future date (currently November 29, 2000). NextWave immediately sought relief in the bankruptcy court, which held that the FCC's attempted cancellation of the licenses was void on several independent grounds. On May 25, 2000, the Second Circuit granted the FCC's mandamus petition, holding that the bankruptcy court lacked jurisdiction to determine whether the FCC's attempted cancellation violated the Bankruptcy Code because "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Denial Of Bankruptcy-Court Jurisdiction Cannot Be Reconciled With Decisions Of Other Courts Of Appeals And This Court

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

The Second Circuit's decision below conflicts with decisions of the Third, Fifth, Ninth, and Federal Circuits. Unlike the Second Circuit, these other courts of appeals have given full effect to the broad grant of bankruptcy jurisdiction set forth in 28 U.S.C. § 1334, and have recognized correctly that Section 1334(b) confers bankruptcy jurisdiction even over proceedings that might otherwise be subject to the exclusive jurisdiction of another court. This Court's review is essential to resolve this stark conflict among the circuits.

By the express terms of 28 U.S.C. § 1334, Congress granted jurisdiction over all bankruptcy-related proceedings to the district court (and, by reference, to the bankruptcy court, 28 U.S.C. § 157(a) & (b)), and expressly overrode all exclusive-jurisdiction provisions of other statutes:

> *Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district courts shall have original but not exclusive jurisdiction of *all* civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b) (emphases added); *see also* H.R. REP. NO. 595, 95th Cong., 2d Sess. 445 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6400 (Section 1334(b) "is the broadest grant of jurisdiction to dispose

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courts of appeals." *In re FCC*, No. 99-5063, 2000 U.S. App. LEXIS 11615, at *37-*39 (2d Cir. May 25, 2000).

of proceedings that arise in bankruptcy cases or under the bankruptcy code").

Despite Congress's unambiguous mandate that bankruptcy jurisdiction under Section 1334(b) should override other exclusive-jurisdiction statutes, the court below held that the bankruptcy court lacked jurisdiction over NextWave's fraudulent conveyance action, brought under Section 544 of the Bankruptcy Code, "[b]ecause jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals." App., *infra*, 21a. In rejecting bankruptcy jurisdiction here, the Second Circuit relied on the very type of exclusive-jurisdiction statutes that Section 1334(b)'s "notwithstanding" provision expressly trumps. *See id.*, citing 28 U.S.C. § 2342 (granting exclusive jurisdiction to courts of appeals to review final orders of the FCC), and 47 U.S.C. § 402(b) (granting exclusive jurisdiction to the District of Columbia Circuit to review certain FCC licensing orders).[3]

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[3] The breadth of the Second Circuit's jurisdictional holding is confirmed by that court's recent mandamus decision vacating the bankruptcy court's determination that the Bankruptcy Code prohibits the FCC's attempt to cancel NextWave's licenses. Without addressing the merits of the FCC's attempted cancellation, the Second Circuit reiterated that "[t]he [exclusive] jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court [sought] to exercise." *In re FCC*, 2000 U.S. App. LEXIS 11615, at *38. Thus, the Second Circuit obviously intends to adhere to its indefensibly restrictive view of bankruptcy court jurisdiction. Moreover, the impact of the decision below is already being felt in other pending bankruptcy cases. In *In re Personal Communications Network, Inc.*, No. 199-20207-575 (Bankr. E.D.N.Y. June 7, 2000), the court relied on the decision below in holding that it lacked jurisdiction over the debtor's FCC licenses because the FCC had purported to cancel them.

The decision below conflicts directly with the decisions of those courts of appeals that have considered whether Section 1334 confers bankruptcy-court jurisdiction over bankruptcy-related proceedings despite the existence of statutes purporting to grant exclusive jurisdiction to a different court. The Federal Circuit, for example, in *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995), held that the district court in bankruptcy has concurrent jurisdiction over government contract disputes notwithstanding the provisions of the Tucker Act, which "purports to make the Court of Federal Claims the exclusive trial court for hearing" such claims. *Id.* at 1572-73 (citing 28 U.S.C. §§ 1346(a)(2), 1491(a)(2)). The court held that Section 1334(b) clearly overrides any competing exclusive-jurisdiction statute:

> Congress . . . anticipated that there would be claims involving a bankrupt's estate that, by statute, were assigned exclusively to some court other than a district court. Congress, wishing to give the district court sitting in bankruptcy plenary authority over the bankrupt's estate and *all claims by or against it*, expressly provided that the district court would have concurrent jurisdiction over all claims, *even those which by statute were within the exclusive jurisdiction of other federal courts*.

Id. at 1573 (emphases added). The Federal Circuit thus concluded that "[t]here can be little doubt that, by statute, both the District Court, sitting in bankruptcy, and the Court of Federal Claims are empowered with subject matter jurisdiction over this . . . dispute." *Id.*

The Third Circuit has similarly held that Section 1334(b) provides bankruptcy and district courts with jurisdiction despite the existence of a conflicting statutory grant of exclusive jurisdiction to another court. *See Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 385-86 (3d Cir. 1987). Although 29 U.S.C. § 660(b) purported to grant to the courts of appeals "original and exclusive jurisdiction" to review the federal agency or-

der at issue in that case, the Third Circuit explained that "section 1334(b) alters the effect of the jurisdictional grant of section 660(b) by expressly rendering it non-exclusive." *Id.* at 385. Thus, contrary to the Second Circuit's approach, the *Brock* court held that, notwithstanding any other statutory grant of exclusive jurisdiction to a different court, "the effect of 28 U.S.C. § 1334(b) is to grant the district court overseeing the bankruptcy concurrent original jurisdiction." *Id.*; *see also In re University Med. Ctr.*, 973 F.2d 1065, 1072, 1073-74 (3d Cir. 1992).

The Ninth Circuit has reached this same conclusion, declaring that Section 1334(b) demonstrates Congress's clear intent "'to bring all bankruptcy-related litigation within the umbrella of the district court, . . . *irrespective of congressional statements to the contrary in the context of other specialized litigation.*'" *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1992) (citation omitted; emphasis added). Indeed, the Ninth Circuit has recently reaffirmed that "the purpose of [Section 1334(b)] is . . . to allow district courts in which the bankruptcy case is filed to adjudicate bankruptcy-related actions *in which jurisdiction has been vested in other courts*." *In re Gruntz*, 202 F.3d 1074, 1083 (9th Cir. 2000) (emphasis added).[4]

In a matter strikingly similar to the instant case, the Fifth Circuit has allowed a bankruptcy court to exercise jurisdiction over the FCC. In *United States v. GWI PCS 1, Inc.*, 245 B.R. 59 (N.D. Tex. 1999), as here, the

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[4] Lower federal courts have reached the same conclusion. *See, e.g., In re Horizon Air, Inc.*, 156 B.R. 369, 377-78 (N.D.N.Y. 1993) (district court has jurisdiction over challenge to FAA's order revoking operating certificate); *In re Bulldog Trucking, Inc.*, 150 B.R. 912, 915-16 (W.D.N.C. 1992) (Section 1334(b) grants concurrent jurisdiction despite Section 2342); *In re Transcon Lines*, 147 B.R. 770, 774 (Bankr. C.D. Cal. 1992) (same).

district court affirmed the bankruptcy court's ruling in favor of C-Block license holders that brought a fraudulent conveyance action against the FCC, concluding that the license holders were permitted to retain the licenses, while avoiding more than $900 million of the original $1.06 billion bid as a fraudulent conveyance. *Id.* at 60. In direct contrast to the Second Circuit's rejection of bankruptcy-court jurisdiction, the Fifth Circuit declined even to grant the FCC a stay of plan confirmation pending disposition of the FCC's appeals. *In re United States*, No. 98-11123 (5th Cir. Oct. 7, 1998); *see* 245 B.R. at 61.[5]

Thus, the decision below is in stark conflict with decisions of the Third, Fifth, Ninth, and Federal Circuits on whether otherwise applicable exclusive-jurisdiction provisions oust bankruptcy and district courts of their Section 1334 jurisdiction. This Court's review is necessary to resolve the conflict.[6]

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[5] The FCC's subsequent appeals in *GWI* were rejected by the district court. 245 B.R. at 64. An appeal of the district court's decision is currently pending in the Fifth Circuit. *FCC v. GWI PCS 1, Inc.*, No. 99-11294 (5th Cir. oral arg. Feb. 3, 2000).

[6] The judgment below is also inconsistent with 28 U.S.C. § 1334(e), which provides that the district court has "exclusive jurisdiction of all of the . . . property of the estate," and with decisions of other courts of appeals holding or assuming that FCC licenses are property of the estate for bankruptcy purposes. *See In re Central Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *In re Tak Communications, Inc.*, 985 F.2d 916, 918 (7th Cir. 1993); *In re Atlantic Bus. & Community Dev. Corp.*, 994 F.2d 1069, 1075 (3d Cir. 1993). The court below did not expressly address whether FCC licenses are property of the estate for bankruptcy purposes, but the court's rejection of bankruptcy jurisdiction over FCC licenses is irreconcilable with those authorities.

B. The Decision Below Conflicts With This Court's Precedents

The decision below is also inconsistent with this Court's precedents. In *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), for example, this Court unequivocally declared that Section 1334(b), by its plain terms, "authorizes a district court to exercise concurrent jurisdiction over certain bankruptcy-related civil proceedings *that would otherwise be subject to the exclusive jurisdiction of another court.*" 502 U.S. at 41 (emphasis added). Moreover, as this Court has also observed, "Congress intended to grant *comprehensive jurisdiction* to the bankruptcy courts so that they might deal efficiently and expeditiously with *all matters connected with the bankruptcy estate.*" *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citation omitted; emphases added). Indeed, as this Court noted in *Celotex*, the special importance of Chapter 11 proceedings reinforces the jurisdictional analysis, because bankruptcy jurisdiction in such cases "may extend more broadly" than in other contexts, and must encompass any proceeding that could affect the debtor's ability to formulate a feasible plan of reorganization. *See Celotex*, 514 U.S. at 310. By eviscerating the authority of bankruptcy courts to adjudicate a large category of bankruptcy claims relating to the rights and obligations of debtors, the court of appeals violated the principles enumerated by this Court in *Celotex* and *MCorp*.

The decision below is also irreconcilable with this Court's case law governing the interpretation of federal statutes. This Court has held that "the use of . . . a 'notwithstanding' clause [such as that included in Section 1334(b)] clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of *any* other section." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). The Second Circuit's ruling, on the other hand—that despite the plain meaning of Section

1334(b)'s "notwithstanding" clause, the exclusive-jurisdiction provisions of the FCA and the Hobbs Act preclude bankruptcy-court review—is flatly inconsistent with this Court's construction of such clauses.[7]

C. The Jurisdictional Question Is Important And Recurring And Requires This Court's Review

By permitting otherwise applicable exclusive-jurisdiction provisions to trump the bankruptcy court's Section 1334 jurisdiction, the decision below effectively nullifies Congress's express command and creates an amorphous and infinitely elastic "regulatory" exception to bankruptcy-court jurisdiction. Under the Second Circuit's approach, every federal agency whose decisions are reviewable pursuant to an exclusive-jurisdiction provision could characterize a bankruptcy-related proceeding as interfering with its "regulatory" functions, thereby obtaining immunity from bankruptcy-court jurisdiction. The result would be regular evasions of Congress's clear mandate that district and bankruptcy courts hearing bankruptcy cases must possess authority to address *all* aspects of the debtor's rights and responsibilities in order to ensure a complete and efficient resolution of the bankruptcy.

Congress has enacted numerous provisions that purport to vest exclusive jurisdiction in courts other than

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[7] The decision below also conflicts with the well-established principle that a claimant (including a governmental entity) that files a claim in a bankruptcy case submits to the jurisdiction of the bankruptcy court, and likewise to application of the bankruptcy laws. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990); *Katchen v. Landy*, 382 U.S. 323, 334-36 (1966); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-44, 852 (1986). It is undisputed that the FCC filed a proof of claim against NextWave in this bankruptcy case asserting a liability in excess of $4.7 billion.

the district courts. For example, the Second Circuit based its decision in part on an exclusive-jurisdiction provision of the Hobbs Act, 28 U.S.C. § 2342(1), which grants exclusive jurisdiction over FCC final orders to the courts of appeals. That same act, however, also grants to the courts of appeals exclusive jurisdiction over final orders, rules, regulations, or actions of six other departments or agencies. *See* 28 U.S.C. §§ 2342(2) (Department of Agriculture), 2342(3)(A) (Department of Transportation), 2342(3)(B) (Federal Maritime Commission), 2342(4) (Atomic Energy Commission); 2342(5) (Surface Transportation Board), 2342(6) (Department of Housing and Urban Development), and 2342(7) (Department of Transportation).

The Second Circuit also relied in part on the exclusive jurisdiction of the D.C. Circuit to review FCC licensing orders under the FCA, 47 U.S.C. § 402(b). The D.C. Circuit has been granted exclusive jurisdiction to review decisions of several other administrative agencies as well, including the Federal Election Commission (*see* 2 U.S.C. § 437g(a)(8)(A)) and the Environmental Protection Agency (*see, e.g.*, Safe Water Drinking Act, 42 U.S.C. § 300j-7(a); Clean Air Act, 42 U.S.C. § 7607(b); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(a)). In addition, several other courts, including the Court of Federal Claims, the Federal Circuit, the Court of International Trade, and the Court of Veterans Appeals, also possess exclusive jurisdiction over specific types of claims. *See, e.g.*, 28 U.S.C. § 1491 (granting the Court of Federal Claims exclusive jurisdiction over certain claims against government agencies); 28 U.S.C. § 1295(a)(6)-(14) (granting the Federal Circuit exclusive jurisdiction to review certain determinations by the Secretary of Commerce, the Merit Systems Protection Board, agency boards of contract appeals, and various other matters); 28 U.S.C. § 1581 (providing the Court of International Trade with exclusive jurisdiction over the review of certain administrative decisions involving tar-

iffs); 38 U.S.C. § 7252 (providing the Court of Appeals for Veterans Claims with exclusive jurisdiction to review decisions by the Board of Veterans' Appeals); 49 U.S.C. § 46110(a) (granting the courts of appeals exclusive jurisdiction over final action by the Federal Aviation Administration).

There is thus no principle that would limit the impact of the Second Circuit's decision to the FCC. Rather, under the rule adopted below, whenever an agency whose decisions are reviewable under an exclusive-jurisdiction provision characterizes a bankruptcy claim or proceeding as relating to its "regulatory" function, the agency would be immunized from bankruptcy-court jurisdiction. As a result, resolution of the estate's claims would be fractured and dispersed over multiple courts, despite Congress's clear intent that the bankruptcy courts have centralized control over the resolution of debtors' estates, and that the Bankruptcy Code apply to agencies when dealing with debtors in bankruptcy. Such a result would frustrate the paramount purposes of the Bankruptcy Code and would dramatically alter the careful and reticulated balance that Congress has struck between creditors' and debtors' rights in the Code. The consequences would be seriously detrimental, not only for debtors attempting reorganization, but also for countless creditors, investors, employees, and other innocent third parties who depend upon the equitable and efficient resolution of bankruptcies.

Congress, in fact, recognized the overarching importance of vesting bankruptcy courts with the broadest possible jurisdiction, and the Second Circuit's wholesale rejection of Congress's policy determination presents a further compelling justification for this Court's review. As the House Report on Section 1334 explained, that section's "comprehensive" grant of bankruptcy-court jurisdiction was "a significant change from current law," and was necessary to "greatly diminish the basis for litigation of jurisdictional issues which consumes so

much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs." H.R. REP. NO. 595, 95th Cong., 2d Sess. 445 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6007, 6400. The Senate Report further explained, "[t]his broad grant of jurisdiction will enable the bankruptcy courts . . . to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code . . . [including] [a]ctions that formerly had to be tried in [other courts] at great cost and delay to the estate." S. REP. NO. 989, 95th Cong., 2d Sess. 153 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939.

This Court, moreover, has recognized that bankruptcy-court jurisdiction, particularly in Chapter 11 cases, serves the important purposes of "provid[ing] for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors." *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 389 (1993) (citation omitted). As this Court has also explained, however, those important purposes can be achieved *only* by honoring the Bankruptcy Code's carefully calibrated network of compromises, and thus courts must be especially careful not to upset the balance struck by Congress: "[B]y adding through judicial fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 331 (1999). The decision below, by creating a broad exception to bankruptcy courts' Section 1334 jurisdiction, achieves precisely that forbidden result.

The Second Circuit's holding that the FCC's purported "regulatory" functions are completely outside the purview of bankruptcy, for example, not only frustrates the purposes of Section 1334(b), but also contradicts

several other provisions of the Bankruptcy Code that reveal Congress's intent that regulatory agencies be subject to the bankruptcy process rather than be exempted from it *ab initio*.[8] Of particular relevance here, Congress plainly contemplated that bankruptcy courts would have jurisdiction to review regulatory actions pertaining to licensing decisions. Section 525 of the Code expressly provides that "a governmental unit may not *deny, revoke, suspend, or refuse to renew a license* . . . or other similar grant to . . . a person that is or has been a debtor . . . solely because such bankrupt or debtor is or has been a debtor . . . or has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. § 525(a) (emphasis added). Accordingly, Congress must have intended that governmental units that regulate licenses, including the FCC, be subject to the Bankruptcy Code.

The Code's general applicability to regulatory agencies is also demonstrated by the presence of specific *exceptions* for regulatory agencies—including exceptions to the automatic stay of 11 U.S.C. § 362, a bedrock provision of the Code. Congress has expressly exempted certain limited exercises of "police and regulatory power" from some aspects of the automatic stay, *see* 11 U.S.C. § 362(b)(4), and has created other, more specific exceptions for certain acts by individual agencies. *See, e.g.*, *id.* § 362(b)(8) (Secretary of Housing and Urban Development); *id.* § 362(b)(12) (Secretary of Transportation); *id.* § 362(b)(13) (Secretary of Commerce); *id.* § 362(b)(16) (Secretary of Education); *see also id.*

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[8] *E.g.*, 11 U.S.C. § 106(a)(2), (a)(3), (b) (waiving U.S. sovereign immunity, granting power to "hear and determine any issue arising with respect to the application of [Section 544 and other Bankruptcy Code provisions] to governmental units," and granting power to issue "an order, process, or judgment" against governmental units); 11 U.S.C. § 101(27) (defining "governmental unit" to include any "department, agency, or instrumentality of the United States").

§ 525(a) (excepting some acts of the Department of Agriculture from the license-cancellation ban); *id.* §§ 555, 556, 761 (creating different bankruptcy rules for liquidating commodity brokers, securities contracts, commodities contracts, and forward contracts). No such exceptions exist for the FCC. Nor, of course, does any bankruptcy provision broadly except *any* agency from the Bankruptcy Code, or from bankruptcy courts' power to apply the Code.

As the clear and carefully limited exceptions contained in the Bankruptcy Code demonstrate, if Congress had intended to alter the fundamental purpose and balance of the Code by creating a broad exception to the jurisdictional provisions for certain federal agencies acting in their "regulatory capacity" (App., *infra*, 21a), it would have done so explicitly. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (rejecting IRS's claim to be exempt from the reach of the Bankruptcy Code, because "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector"). The sweeping loophole created by the court below thwarts Congress's obvious desire to vest bankruptcy courts with the widest possible jurisdiction over all bankruptcy-related matters, and dramatically affects not only debtors in reorganization, but also the many third parties whose interests the bankruptcy process is supposed to protect and harmonize, including creditors, investors, and employees. The proper functioning of the capital markets depends on the ability of private creditors to rely on the protections built into the bankruptcy system.

The decision below, by permitting exclusive-jurisdiction statutes to trump Section 1334(b)'s grant of bankruptcy jurisdiction, violates the congressional plan, gives federal agencies an overwhelming and unfair advantage over other creditors in bankruptcy proceedings, and threatens to undermine the basis on which the capital markets make billions of dollars available to regu-

lated companies. This Court's review is essential to prevent the decision below from upsetting the careful balance struck by Congress in the Bankruptcy Code.

II. The Second Circuit's Rejection Of NextWave's Avoidance Action Contradicts The Decisions Of Other Courts Of Appeals And This Court

The Second Circuit reversed the bankruptcy court's holding that NextWave's promissory-note obligations were avoidable as a fraudulent conveyance. Given the bankruptcy court's undisputed finding that the licenses were worth only $1.023 billion as of February 1997, the dispositive issue for purposes of the fraudulent conveyance claim was the date on which NextWave incurred its obligation to pay the purchase price for the licenses. *See* App., *infra*, 26a. Addressing this issue, the Second Circuit concluded that NextWave became obligated to pay the full purchase price for the licenses at the close of the auctions, rather than when the licenses were granted many months later. *Id.* at 34a. But rather than resolve this dispositive issue as a matter of bankruptcy law, the court expressly predicated its ruling on deference to the FCC's litigation-generated interpretation of the contractual obligations created by its auction regulations: "Our ruling *is based on* the FCC's interpretation of its own regulations, to which we owe deference, but to which the courts below refused deference on grounds we conclude invalid." *Id.* at 27a (emphasis added).

The Second Circuit's failure to apply applicable bankruptcy-law standards and its decision to defer to the FCC's litigation-inspired interpretation of its auction contracts conflicts with other court of appeals decisions refusing to defer to agency interpretations of contractual obligations, and with case law holding that no deference is due to agency litigating positions. This Court's review is essential to resolve these conflicts.

A. The Decision Below Conflicts With Cases Rejecting Deference For An Agency's Interpretation Of Its Own Contracts

The agency interpretation to which the court of appeals deferred in this case is in essence an interpretation of the terms of the FCC's auction contract with high bidders. Indeed, the FCC asserted below that its auction regulations were intended to "correspond to the terms of a standard auction contract" and to "incorporate the traditional measure of expectation damages for breach of contract." FCC C.A. Br. 43, 44.

Contrary to the Second Circuit's decision to defer to the FCC's interpretation of its auction contracts, however, several courts of appeals have held that an agency is not entitled to deference in interpreting its own contracts, even where, as here, those contractual rights and obligations are themselves contained in regulatory documents. As then-Judge Breyer explained for the First Circuit in *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 604 (1st Cir. 1991), "it would seem surprising and unfair if the terms of [a regulatory document that also serves as a contract], without so stating, bind the [private party], but leave the [agency] free to interpret those same terms as it wishes (limited only by the bounds of 'reasonableness')."

The decision below is irreconcilable with the First Circuit's reasoning in *Meadow Green*. There, the court held that a land use permit issued by the Forest Service, although issued pursuant to the agency's regulatory duties, was similar to a contract, and, therefore, that the agency's interpretation of that permit was not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court based its decision on several factors, including that (1) "the Permit document itself reads like a contract," (2) a primary purpose of the permits was "to offer a permittee the security needed to raise many millions of dollars in investment," (3) the Forest Service treated the

permit "as if it were a kind of contract," and (4) neither *Chevron* nor any other authority from any court requires deference to an agency's interpretation of a contract. 936 F.2d at 604.

Each of these factors compels the conclusion that the Second Circuit departed from settled law in deferring to the FCC's purported interpretation of the auction contracts at issue here. Indeed, the FCC's auction regulations are even more clearly contractual than were the land use permits at issue in *Meadow Green*. Unlike the Forest Service in that case, the FCC does not (and cannot) dispute that the auction regulations governing spectrum block licenses form an enforceable contract binding on both the licensee and the FCC. Nor is there any doubt that Congress intended the FCC to enter into—and be bound by—such commercial contracts: "The Committee anticipates that in some instances the Commission will act in a manner that is comparable to a mortgage banker, who designs new mortgage instruments in order to increase the universe of people who can afford to buy homes." H.R. REP. NO. 111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 582.

Moreover, even more so than the land use permits at issue in *Meadow Green*, the FCC's auction contracts are designed to provide the licensee "the security needed to raise many millions of dollars in investment." 936 F.2d at 604. The Second Circuit's deference to the FCC's interpretation of these contracts is flatly inconsistent with that purpose. As the First Circuit explained, "[w]e do not see how a document, the terms of which one party remains comparatively free to interpret to its own advantage, can provide the other party (and its financial backers) the security, stability, or assurance a large and long-term investment would seem to require." *Id.*

The decision below also conflicts with the District of Columbia Circuit's decision in *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598

(D.C. Cir. 1992). There, the court held that the Office of Thrift Supervision ("OTS") was entitled to no deference in interpreting certain provisions of FIRREA that purported to alter pre-existing forbearance agreements between OTS and certain financial institutions. The court rejected the agency's deference arguments based on its longstanding "concern about deferring to an agency interpretation of an agreement to which the agency is a party." *Id.* at 614. The court reiterated its view that although an agency might be entitled to *Chevron* deference for interpretations of agreements to which it is not an interested party, a different rule applies when an agency attempts to interpret its own contracts. *Id.* (citing *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987)). In such circumstances, "'*deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract.*'" 967 F.2d at 614 (quoting *National Fuel*, 811 F.2d at 1571) (emphasis added). Thus, the Second Circuit's decision to defer to the FCC's interpretation of its own contracts directly contradicts the rule announced by both the First Circuit and the District of Columbia Circuit.

Contrary to the decision below, moreover, other courts of appeals have refused to defer to an agency interpretation that is based on the agency's application of general common law principles, rather than on the agency's particular expertise. The Fourth Circuit, for example, in *Burgin v. Office of Personnel Management*, 120 F.3d 494 (4th Cir. 1997), rejected the OPM's interpretation of a provision in a government employee's health insurance plan. The court explained that although deference to an agency's interpretation of its own regulations is generally required, "'[w]hen the administrative interpretation is not based on expertise in the particular field, . . . but is based on general common law principles, great deference is not required.'" *Id.* at 497 (quoting *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978)). Because "the essential

question" in *Burgin*, like the question in this case, was "one of the interpretation of the contract's language," it was "a question of law clearly within the competence of courts" and was subject to *de novo* review. *Id.* at 497-98 (citing *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960)).[9]

The Second Circuit's blind deference to the FCC's interpretation of its own contractual relationship with NextWave also is inconsistent with—and threatens to undermine—this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). The Second Circuit justified its deference to the FCC's contract interpretation because "[t]he FCC's auction rules . . . have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." App., *infra*, 22a. "The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor . . . ." *Id.*

This Court in *Winstar* recognized that both the supervisory merger agreements at issue there, and Congress's subsequent enactment of FIRREA, were "regula-

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[9] Deference is also inappropriate because the determination of when an allegedly fraudulent transfer occurred is governed by federal bankruptcy law. *See Barnhill v. Johnson*, 503 U.S. 393, 397-98 (1992) ("'What constitutes a transfer and when it is complete' is a matter of federal [bankruptcy] law.") (citation omitted). Obviously, the FCC has no expertise or interpretive authority under the Bankruptcy Code, and is therefore entitled to no deference on this question. As this Court held in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990), "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority," and thus no deference is due when, as here, "Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute."

tory" acts. *See* 518 U.S. at 894 (plurality opinion) ("thrift regulation is, in fact, regulation, and . . . both the supervisory mergers of the 1980's and the subsequent passage of FIRREA were meant to advance a broader public interest"); *id.* at 920-21 (Scalia, J., concurring in the judgment) ("Government regulation" was "the very *subject matter* of these agreements, an essential part of the *quid pro quo*"). Nevertheless, because "the government *chose to regulate* . . . [by] enter[ing] into supervisory merger agreements to convert some of its financial insurance obligations into responsibilities of private entrepreneurs," it was still bound by the same laws governing contract formation (and interpretation) as private parties. *Id.* at 894 (plurality opinion) (emphasis added); *see also Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there"); *accord United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737 (1979) ("Congress has not . . . confer[red] special privileges on agencies that enter the commercial field").

That an agency entering into contracts with private parties claims to have a regulatory purpose does not entitle the agency to special treatment. As the plurality opinion in *Winstar* explained, "when the United States enters into contract relations"—as the FCC has unquestionably done here—"its rights and duties therein are governed generally by the law applicable to contracts between private individuals." 518 U.S. at 895 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)). The decision below thus conflicts with settled doctrines of other courts of appeals and this Court, and this Court's review is necessary to resolve this important conflict.

B. The Decision Below Conflicts With Cases Rejecting Deference For An Agency's Litigating Positions

The FCC's post-hoc "interpretations" of the auction regulations to which the Second Circuit so completely deferred are statements that were inserted into FCC orders only after the FCC had been sued in bankruptcy-related avoidance actions by several C-Block licensees. The Second Circuit's decision to give deference to such a litigation-driven interpretation conflicts with decisions of this Court and other appellate courts refusing to defer to agency "interpretations" that amount to nothing more than post-hoc litigating positions. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

The primary order relied upon by the Second Circuit, *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses*, FCC 98-301, 1998 WL 889489 (Dec. 23, 1998), demonstrates that the FCC's self-serving "interpretations" were motivated by its litigation interests. The order itself concerned new documentation the FCC was requiring of licensees seeking approval to transfer all or part of their licenses, and involved a licensee that was not itself in bankruptcy. Nevertheless, the FCC inserted into that order the following sentence: "One document that we requested—an Assignment and Assumption Agreement—is designed to ensure that the government's rights arising from the licensee's binding obligations to repay the original bid price for the licenses (incurred upon acceptance of the high bid and continued to date) would not be unduly compromised in bankruptcy or otherwise by the assignment of this obligation." *Id.* Nothing else in the order relates to the timing of payment obligations.

In a separate statement accompanying that order, FCC Chairman William Kennard admitted that the order addressed issues that "only emerge[d] as a result of lessons learned during litigation." *Id.* Moreover, FCC Commissioner Harold W. Furchtgott-Roth wrote sepa-

rately to highlight the unfair way in which the licensee in that order, Tritel Communications, Inc., had been hijacked by the FCC's bankruptcy litigation tactics: "Rather than treat [Tritel's] applications [to transfer certain of its licenses related to a routine corporate restructuring] on their face, FCC staff decided to link these transfers to the Commission's C-Block bankruptcy litigation strategy in which Tritel had no direct role. As a result, Tritel found itself at the mercy of the FCC litigation tactics, not business necessities." *Id.*

The Second Circuit's decision to defer to the FCC's litigation-inspired interpretation directly conflicts with a long line of Fifth Circuit cases holding that an agency's post-hoc litigating position is not entitled to deference, even where, as here, it has been inserted into "formal" regulatory documents short of full notice and comment rulemaking. *See Waste Control Specialists v. United States Dep't of Energy*, 141 F.3d 564, 567 (5th Cir. 1998) (according no deference to Department of Energy's formalized interpretations "because [DOE] had not enunciated its interpretation prior to the litigation"); *United States v. Food, 2,998 Cases*, 64 F.3d 984, 987 n.5 (5th Cir. 1995) ("Because it appears the FDA interpreted § 334 and § 381 at such a time and in such a manner so as to provide a convenient litigating position for this suit, we . . . conclude that the FDA's position is not controlling."); *Irving Indep. Sch. Dist. v. Packard Properties*, 970 F.2d 58, 64 (5th Cir. 1992) (FDIC interpretation of governing statute, formalized in a legal memorandum, afforded no deference because memorandum was "issued during pending litigation").

Like the decision below, these cases typically involve agencies that memorialize policies or interpretations in response to litigation but not through full-scale notice and comment procedures. *See generally Waste Control Specialists*, 141 F.3d at 567 (Department of Energy's policy was "set forth only in its memorandum, which [was] not the product of a formal rulemaking").

The Fifth Circuit, unlike the Second Circuit below, correctly recognizes that such tactical post-litigation agency memoranda and rulings devised after the onset of adversary proceedings simply do not "reflect [a] . . . fair and considered judgment on the matter," *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Instead, those constructions are merely articulations of what the agency thinks it needs to win its case in court, and are therefore undeserving of deference.

The District of Columbia Circuit, on the other hand, has interpreted this Court's decision in *Auer* to mean that agency positions adopted for the first time in a case in which the agency is a litigant may be entitled to deference "so long as they represented the agency's 'fair and considered judgment on the matter.'" *United Seniors Ass'n v. Shalala*, 182 F.3d 965, 971 (D.C. Cir. 1999) (citations omitted). This Court's *Auer* decision, however, involved deference to the judgment of a federal agency announced in an *amicus* brief, and thus did not involve an agency interpretation adopted in direct response to litigation involving the agency itself. To import *Auer*'s reasoning into cases, such as this one, where the agency is a litigant, distorts *Auer* and directly conflicts with this Court's decision in *Bowen v. Georgetown University Hospital*, which held that it is "entirely inappropriate" for courts to defer to an agency's "convenient litigating position." 488 U.S. at 212-13.

The decision below exacerbates the existing conflicts and confusion on this important and recurring issue of agency deference. This Court's review is warranted to clarify this unsettled area of the law.

C. The Decision Below Contradicts The FCC's Own Regulations And Principles Of Contract And Auction Law

In addition to improperly deferring to the FCC's interpretation of its auction regulations, the Second Circuit violated relevant legal standards when it determined

that NextWave became obligated to pay the full purchase price for the licenses at the close of the auctions, rather than when the licenses were granted many months later. App., *infra*, 34a. The Second Circuit based its decision primarily on 47 C.F.R. § 1.2104(g), a *penalty* provision specifying the penalties that auction participants *may* be obliged to pay *if* they "withdraw high bids during the course of an auction," or "default[] or [are] disqualified after the close of such an auction." According to the Second Circuit, because the FCC's penalty rules provide that a high "bidder is liable for any shortfall between the subsequent winning bid and its own," the penalty "is the functional analog of expectation damages," which high bidders become liable to pay at the close of the auction. App., *infra*, 29a-30a.

Contrary to the Second Circuit's reasoning, however, the "shortfall" penalty is plainly different than the full bid amount. The penalty for withdrawing a high bid *during* an auction is "the difference between the amount bid and the amount of the winning bid the next time the license is offered," 47 C.F.R. § 1.2104(g)(1), the penalty that the Second Circuit found analogous to expectation damages. The penalty for default or disqualification *after* the close of the auction is that same amount, plus 3 percent of the subsequent winning bid (or of the defaulted or disqualified bid, if that is lower). *Id.* § 1.1204(g)(2). Neither penalty, however, obligates the bidder to pay the full amount of the bid. A full-payment obligation arises only after the FCC awards the licenses and the licensee executes promissory notes for the remainder of the purchase price.

The contingent "penalty" obligation relied upon below is on its face entirely unrelated to the licensee's contractual obligation to pay the full purchase price for its licenses. Far from being an "analog" to contract damages, as the Second Circuit held, the potential penalty arises even *before* the FCC accepts the high bidder's offer and the auction closes, and thus, under the

Second Circuit's own reasoning, cannot equate to a contractual obligation on the part of the bidder to pay the full bid price. The penalty "obligations," moreover, are *contingent* upon early withdrawal or default, and NextWave has *never* been assessed any such penalty. NextWave's avoidance action thus did not seek to avoid a never-imposed penalty, but instead was aimed solely at the full-payment burden NextWave assumed in 1997, in exchange for the licenses granted by the FCC many months after the close of the auction in mid-1996.

This Court should grant review to eliminate the confusion about this important question that affects the disposition of billions of dollars and numerous PCS licenses for past and future bidders across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 9, 2000

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1999

(Argued: November 1, 1999 Decided: December 22, 1999)

Docket No. 99-5063

In Re: NEXTWAVE PERSONAL COMMUNICATIONS, INC.

Debtor.

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

- v –

NEXTWAVE PERSONAL COMMUNICATIONS, INC.,

Appellee.

Before: McLAUGHLIN, JACOBS and SACK,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*) affirming five decisions and orders of the United States Bankruptcy Court for the Southern District of New York (Adlai S. Hardin, *Bankruptcy Judge*) rendered in the adversary proceeding of NextWave Personal Communications, Inc. against the Federal Communications Commission. The district and bankruptcy courts exceeded their jurisdiction by in effect intervening in the allocation of radio spectrum licenses and misconstrued the nature of the Appellee's financial obligations under the Federal Communications Commission's spectrum auction rules. Accordingly, we

reverse the judgment of the district court affirming the orders of the bankruptcy court and remand for further proceedings consistent with this opinion, if any are necessary.

DANIEL S. ALTER, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York and Gideon A. Schor, Assistant United States Attorney, Of Counsel), *for Appellant.*

DEBORAH L. SCHRIER-RAPE, Andrews & Kurth L.L.P., Dallas, TX (Gregory H. Bevel, Michelle V. Larson and James P. Muenker, Of Counsel), *for Appellee.*

David M. Friedman, Kasowitz, Benson, Torres & Friedman L.L.P., New York, NY, *for amicus curiae Official Committee of Unsecured Creditors.*

Anthony A. Dean, Windels, Marx, Davies & Ives, New York, NY (Charles E. Simpson, Of Counsel), *for amicus curiae Urban Comm-North Carolina, Inc.*

PER CURIAM:

The Federal Communications Commission (the "FCC") appeals from an order of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 99 Civ. 4439 (CLB) (S.D.N.Y. July 27, 1999), affirming five decisions and orders of the United States Bankruptcy Court for the Southern District of New York (Adlai S. Hardin, Bank-

ruptcy Judge).[1] On November 24, 1999, we issued an order reversing the judgment of the district court and remanding the case for further proceedings, with an opinion to follow. This is that opinion.

In pertinent part, the decisions and orders of the bankruptcy court, affirmed by the district court judgment from which the FCC appeals, held that the FCC's grant to NextWave Personal communications, Inc. ("NextWave") of sixty-three radio spectrum licenses for which NextWave had been the high bidder at the FCC's 1995-96 C-Block" auction (the "Licensees") was a constructively fraudulent conveyance for purposes of 11 U.S.C. § 544 ("§ 544"). *See NextWave* IV.A, 235 B.R.

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[1] *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision denying motion to lift automatic stay) (*NextWave* V); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999) (May 12, 1999 decision on fraudulent conveyance claim) (*NextWave* IV.A) *as supplemented by NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 305 (Bankr. S.D.N.Y. 1999) (June 22, 1999 decision on remedy) (*NextWave* IV.B); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of FCC's motion to dismiss) (*NextWave* III); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to FCC and granting to debtor partial summary judgment with regard to date upon which obligations were incurred) (*NextWave* II); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 263 (*In re NextWave Personal Communications, Inc.)*, 235 B.R. 263 (Bankr. S.D.N.Y. 1998) (Dec. 7, 1998 decision granting in part and denying in part FCC's motion to dismiss) (*NextWave* I).

at 304. The bankruptcy court therefore avoided $3.7 billion of NextWave's $4.74 billion obligation to the FCC, allowing NextWave to keep the Licenses while it reorganized in bankruptcy. *See NextWave* IV.B, 235 B.R. 305. We hold that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the Licences were fraudulently conveyed by failing to defer to the FCC's interpretation of its own regulations when determining the point at which NextWave's obligations were incurred for § 544 purposes. We therefore reverse the judgment of the district court affirming the orders of the bankruptcy court and remand the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary.

BACKGROUND

In 1993 Congress passed several amendments to the Federal Communications Act (the "FCA"), one of which added § 309(j). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002 (a), 107 Stat. 312, 387 (1993). Section 309(j) authorized the FCC to conduct competitive bidding auctions for radio spectrum licenses. The FCC was instructed to ensure that as part of its auction plan certain blocks of spectrum would be reserved for qualified entities, including small businesses, and that deferred payment plans on favorable terms would be available to them. *See* 47 U.S.C. § 309(j)(3)(B), (j)(4)(D) . Pursuant to these instructions, the FCC reserved a block of 493 licenses known as the "C-block licenses" for the use of qualified entities providing "personal communications services," an emerging form of wireless communications technology.

On May 6 and July 16, 1996, the FCC concluded two sets of C-block auctions, which produced some

ninety successful bidders.[2] NextWave, a startup company established to take advantage of the opportunities created by § 309(j), was the high bidder for sixty-three C-block licenses. Its aggregate winning bids amounted to $4.74 billion.

Pursuant to the FCC regulations issued under § 309(j), winning bidders that were "small businesses" were required to pay only ten percent of their winning bids in cash; the remaining ninety percent could be paid in installments over a ten-year period at below market interest rates. 47 C.F.R. § 24.711(b)(3). NextWave made the required five percent down payment on the Licenses when it was announced as the high bidder on them in the summer of 1996,[3] and subsequently deposited another five percent with the FCC on January 9, 1997, immediately after its application for the Licenses was conditionally approved.

The four-month gap between those two dates resulted from the FCC's auction rules under which a winning bid did not automatically trigger the grant of the

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[2] The C-block auctions ending July 16 involved licenses that became available when high bidders from the first auction defaulted on their initial down payments.

[3] As part of the FCC's auction rules, bidders were required to deposit "qualifying amounts" in order to participate in the auction. NextWave deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. On May 6, 1996 it was declared the winner of 56 of the Licenses, for which it deposited an additional $130,834,333 with the FCC. On July 16 it was named the winner of an additional seven Licenses, for which it deposited $20,138,825 on July 23. At the close of the bidding process, it had therefore deposited a total of $237,182,402, or approximately five percent of its winning bids, with the FCC. *See NextWave* II, 235 B.R. at 273.

license or licenses in question. A winning bidder was required to submit a "long form" application, and the grant of a winning bidder's licenses was conditioned upon that bidder's ability to demonstrate through its application that it was in compliance with FCC regulations and statutory requirements. While over ninety percent of the winning bidders at the C-block auctions were granted their licenses on September 17, 1996, NextWave's ownership structure, specifically its allegedly impermissibly high percentage of foreign ownership, was challenged. The Licenses were conditionally granted to NextWave on January 3, 1997, after NextWave submitted to the FCC a plan to bring its capital structure into compliance with FCC regulations. On February 14, 1997, the FCC granted NextWave the Licenses conditioned upon NextWave issuing a series of promissory notes for the balance of its payments. On February 19, 1997, NextWave executed these promissory notes (the "Notes"), backdated to January 3. The Notes aggregated $4.27 billion, representing the remaining ninety percent of the bid price. By the time the Notes were executed, however, the market value of the Licenses, as later determined by the bankruptcy court, *see NextWave* IV.A, 235 B.R. at 303, had fallen to less than a quarter of the amount that NextWave had bid for them.

The C-block auctions were part of a series of auctions the FCC conducted to allocate spectrum for new technological uses. Prior to the C-block auctions, it had conducted the A- and B-block auctions, and in June 1996 it announced that it would conduct the D-, E- and F-block auctions starting on August 26, 1996. The winning bids at the A-, B-, D-, E- and F-block auctions were sharply lower than the winning bids at the C-block auc-

tions when measured in dollars per MHz-Pop, a generally accepted industry measurement standard.[4]

Since they were obligated to pay what turned out to be much higher prices for their licenses than other licensees, most of the winning C-block bidders, including NextWave, had difficulty securing the financing necessary for them to meet their financial commitments. They thus faced the prospect of an early default on their installment payments to the FCC.

The winning C-block bidders therefore petitioned the FCC for relief. In response, the FCC suspended the C-block installment payments and initiated an elaborate administrative process looking toward a restructuring of the C-block licensees' obligations.

On October 16, 1997, at the culmination of this process, the FCC issued a restructuring order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order*, FCC 97-342, 12 F.C.C.R. 16436 (Oct. 16, 1997), 1997 WL 643811 (F.C.C.) (the "Re-

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[4] The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. The A-, B-, and C-block licenses consisted of 30 MHz of spectrum; the D-, E-, and F-blocks of 10. One "Pop" represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people. NextWave's winning bids averaged at least $1.43/MHz-Pop, whereas the D-, E-, and F-block winning bids averaged $.33/MHz-Pop. The F-block auction, which like the C-block auction was reserved for qualified entities, produced winning bids that averaged only .246/MHZ-pops.

structuring Order"), which offered troubled C-block license holders three mutually exclusive restructuring options, ranging from amnesty -- return of the licenses in exchange for forgiveness of debt obligations -- to a plan that allowed bidders to keep as many of their licenses as they could pay for by converting seventy percent of their down payment into a prepayment of the full bid price of a smaller number of licenses. The FCC decided that it would be contrary to the public interest to forgive a portion of the obligations, thereby allowing bidders to keep their licenses at a significantly reduced price, because the C-block auction had been designed to ensure that licenses were allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses. *Id.* at ¶¶ 5, 19.

In response to the oppositions, petitions and replies that it received after the release of the Restructuring Order, the FCC issued a reconsideration order on March 24, 1998. *See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order*, F.C.C. 98-46, 13 F.C.C.R. 8345 (Mar. 24, 1998), 1998 WL 130176 (F.C.C.) (the "Reconsideration Order"). The Reconsideration Order offered licensees slightly more flexibility in their decision-making process than the Restructuring Order, but otherwise left the Restructuring Order's framework intact. In response to still further petitions from C-block licensees, the FCC conducted yet more proceedings and issued a second reconsideration order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Order on Reconsideration of the Second Report and Order*, F.C.C. 99-66, 14 F.C.C.R. 6571 (Apr. 5, 1999), 1999 WL 183822 (F.C.C.) (the "Second Reconsideration Order"), which

essentially reaffirmed the determinations the FCC had made in its previous two orders.

NextWave actively participated in the administrative process that led to the promulgation of these orders, but it remained dissatisfied with the results. On May 29, 1998, NextWave filed a petition with the Court of Appeals for the District of Columbia Circuit asking for review of the orders. On June 8, 1998 -- the deadline for selecting from the menu of restructuring options provided by the orders -- it asked both the FCC and the Court of Appeals for a stay of those orders so that it would have more time to consider its options. The FCC and the Court of Appeals each denied NextWave's request. *See NextWave Telecom, Inc. v. FCC*, No. 98-1255 (D.C. Cir. June 5, 1998); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, FCC 98-104, 13 F.C.C.R. 11880 (June 1, 1998), 1998 WL 278735 (F.C.C.). The same day, NextWave filed a Chapter 11 petition and instituted an adversary proceeding against the FCC that sought to avoid the company's obligations resulting from its acquisition of the Licenses. *See NextWave* I, 235 B.R. at 267.

NextWave asserted two claims in the adversary proceeding. First, it argued that the transaction in which it acquired the Licenses was a fraudulent conveyance subject to avoidance under § 544 of the Bankruptcy Code (the "Code"). Second, it sought equitable subordination of the FCC's claim based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning the D-, E- and F-block licenses before approving NextWave's application for the C-block Licenses. The FCC moved to dismiss both claims.

The bankruptcy court dismissed the second claim for lack of subject matter jurisdiction, *see NextWave* I, 235 B.R. at 271; NextWave has not appealed from that order. Only the first claim is therefore before us. The

FCC argued below that the bankruptcy court also lacked subject matter jurisdiction over this claim because jurisdiction over actions brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The FCC also argued that the FCA preempted state fraudulent conveyance law. The bankruptcy court rejected these arguments, holding that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. *See NextWave* I, 235 B.R. at 269-71. The court therefore concluded that it had jurisdiction over the claim, and further found that the FCA did not conflict with or preempt its application of fraudulent conveyance law under § 544.

Section 544 (b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." Applicable law includes various state fraudulent conveyance statutes, many based on the Uniform Fraudulent Transfer Act.[5] *See Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). In analyzing a fraudulent conveyance claim under the act, courts determine whether the debtor was engaged or about to engage in a transaction for which the remaining assets of the debtor were unreasonably small in relation to the size of the transaction. If so, and if the consideration provided by the debtor for the allegedly fraudulent transfer was not reasonably equivalent to what the debtor received in return on the effective date of the transfer, then

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[5] The bankruptcy court applied California, New York, and Washington, D.C. fraudulent conveyance law as the "applicable law," holding that there was no substantive difference between the laws of the three jurisdictions. *See NextWave* IV.A, 235 B.R. at 288-89.

the transfer is deemed constructively fraudulent and can be avoided.[6] *See NextWave* IV.A, 235 B.R. at 287-89. In NextWave's case, if there is a § 544 claim at all, its resolution turns on when NextWave's obligations to pay arose. If that is deemed to be the close of the C-block bidding, then the transfer could not be constructively fraudulent because NextWave paid exactly the market price for the Licenses as of that date, as determined by its own bid. *See NextWave* IV.A, 235 B.R. at 297 n.9. However, if the effective date is deemed to be January 3, the date on which the Licenses were conditionally granted, or February 19, 1997, the date on which they were finally granted in return for the executed Notes, then the obligation when it arose was for an amount far greater than what the bankruptcy court deemed to be the market price of the Licenses.

Hoping to resolve this issue quickly, the FCC moved for summary judgment on the question of when NextWave's $4.74 billion obligation was incurred. Despite the FCC's argument that under its regulations the entire obligation became due at the close of the C-block auction, the bankruptcy court found that the effective date of NextWave's obligations for the purposes of § 544(b) was January 3, 1997. *See NextWave* II, 235 B.R. at 276. The court acknowledged that 47 C.F.R. § 1.2104 subjected a winning bidder to a penalty upon default based on the difference between its bid and the high bid on reauction of the licenses, but held that "[n]othing in this calculation explicitly or implicitly

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[6] Avoidance differs considerably from rescission. Rescission unwinds the transaction and restores the status quo ante, whereas avoidance allows the debtor to retain the benefit of its bargain while rewriting the debtor's obligations under that same bargain.

binds the winning bidder to the full amount of its bid." *Id.* at 275.

The FCC then moved to dismiss the complaint on the ground that the avoidance claim challenged a contractual relationship with the United States entered into pursuant to a national regulatory scheme, and that federal common law, rather than state fraudulent conveyance law, therefore was the "applicable law" under § 544. In an oral decision, *NextWave* III, tr. at 50-51, the bankruptcy court refused to create new federal common law to govern the situation, reasoning that fraudulent conveyance law did not abrogate the explicit terms or purposes of the regulatory scheme under § 309(j). *See id.*, tr. at 53-54.

The parties then proceeded to trial. The bankruptcy court concluded under California law that NextWave's obligations were incurred on February 19, 1997; that on that date the Licenses were worth $1,023,211,000; and that all obligations above that amount were constructively fraudulent and therefore avoided. Since NextWave had already paid $474,364,806, or ten percent of its original high bid, to the FCC as a down payment, the remaining obligation was reduced to $548,846,194. *See NextWave* IV.A, 235 B.R. at 304; *NextWave* IV.B, 235 B.R. at 306. The avoidance remedy allowed NextWave to keep the Licenses while obligating it to pay less than one-quarter of the amount it had bid for them.

The FCC appealed to the district court, which affirmed for substantially the reasons stated by the bankruptcy court. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 99 Civ. 4439 (CLB) (S.D.N.Y. July 27, 1999). This appeal, which we have heard on an expedited basis, followed.

DISCUSSION

I. Standard of Review

Our review of the district court's decision affirming the bankruptcy court orders is plenary. We therefore undertake an independent examination of the legal and factual findings of the bankruptcy court, reviewing its findings of law de novo and its findings of fact for clear error. *See Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir. 1997).

II. The Authority of the Bankruptcy and District Courts

The radio (or electromagnetic) spectrum belongs to no one. It is not property that the federal government can buy or sell. It is no more government-owned than is the air in which Americans fly their airplanes or the territorial waters in which they sail their boats.

Although not owned by the federal government, the radio spectrum is subject to strict governmental regulation.

> Before 1927, the allocation of [radio] frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-76 (1969) (footnotes omitted). The scarcity of radio frequencies therefore required a regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to specific users. *See Turner Broadcasting*

Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) ("The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply."). Since 1934, that mechanism has been the licensing of blocks of spectrum for the "public interest, convenience, or necessity," under the FCA, 47 U.S.C. § 307(a), by the FCC. *See generally FCC v Pottsville Broadcasting Co.*, 309 U.S. 134, 136-38 (1940).

A license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms. *See* 47 U.S.C. § 301 (stating the purpose of the FCA, "to provide for the use of [radio] channels, but not the ownership thereof"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("[N]o person is to have anything in the nature of a property right as a result of the granting of a license."). Licenses are revocable by the FCC, and the FCC can impose conditions upon them in the name of the public good. *See* 47 U.S.C. § 308(b).

Historically, the FCC assigned licenses through a system of comparative hearings, rating and ranking applicants under a public interest standard. *See* 47 U.S.C. § 309(a). Partially in response to the huge administrative burden that this method of allocation placed on the FCC, Congress amended the FCA in 1981 by adding § 309(i), which allowed the FCC to award licenses by randomly selecting licensees from the qualified applicant pool. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736 (codified at 47 U.S.C. § 309(i)).

The use of lotteries lessened the administrative burden, but encouraged speculation and, ultimately, failed to allocate licenses to those most likely to use them most efficiently or beneficially. Especially in light of the proliferation of new spectrum-dependent communications

technologies, a method was needed that would direct licenses toward those entities and technologies that would put them to the best use. *See* H.R. Rep. No. 103-111, at 248 (1993) (the "Committee Report"), *reprinted in* 1993 U.S.C.C.A.N. 378, 575.

In its search for such a methodology, Congress came to the conclusion that using market forces to allocate spectrum could accomplish congressionally defined policy goals. As the House Committee on Energy and Commerce explained, "[A] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves." *Id.* at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580. Congress therefore enacted 47 U.S.C. § 309(j) authorizing the FCC to develop a system for allocating spectrum through a competitive bidding process. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j)(3) requires the FCC to design a system of competitive bidding that protects the public interest and promotes the following substantive objectives:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone

> companies, and businesses owned by members of minority groups and women;
>
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; [and]
>
> (D) efficient and intensive use of the electromagnetic spectrum . . . .

47 U.S.C. § 309(j)(3).

While the FCC was expected to "recover[] for the public a portion of the value of the public spectrum" and to avoid "unjust enrichment," the broader purpose of § 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue.[7] Instead, it was told to auction licenses to the

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[7] Section 309(j) (7) (A) specifically limits the degree to which the FCC can designate the generation of revenue as a factor in the "public interest," demonstrating Congress's intent that satisfaction of the FCA's objectives not be equated with income maximization. "[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues." 47 U.S.C. § 309(j) (7) (A). "While Congress has charged [the FCC] to recover a portion of the value of the public spectrum made available via competitive bidding," the process "does not amount to maximizing revenue, nor is it [the FCC's] sole objective." *In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Second Report*

[Footnote continued on next page]

highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580.

In implementing § 309(j), the FCC echoed the congressional rationale: "[A]uction designs that award licenses to the parties that value them most highly will best achieve" the goals set forth by Congress. *In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 70 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.) ("Second Order"). The FCC's views reflect a classical belief in the efficacy of market forces:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

Id. ¶ 71.

Starting from this premise -- that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and efficiently than if handed out for free," Committee

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[Footnote continued from previous page]
and Order, FCC 94-61, 9 F.C.C.R. 2348 ¶ 73 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.).

Report at 249, *reprinted in* 1993 U.S.C.C.A.N. at 576 -- the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and retaining a spectrum license acquired through a § 309(j) auction. *See* 47 C.F.R. § 24.708.

This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions. The FCC gave considerable thought to the problem of how to "deter frivolous or insincere bidding." Second Order ¶ 171. It decided that it would be "critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction." Id. ¶ 197.

Generally, bidders were required to obtain purely private financing and to pay up front for their licenses.[8] *See* 47 C.F.R. § 1.2109(a); Second Order ¶ 194. But "designated entities," such as NextWave -- "designated" because they were less financially powerful than non-"designated" bidders and therefore presumably unable to pay up front -- were allowed to pay in installments. *See* 47 C.F.R. § 24.711(b); Second Order ¶ 194. It was important for the functioning of the auction of licenses to "designated entities" that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the "detailed credit checks" and other forms of due diligence that otherwise would be necessary to ensure, within the framework of a competitive auction method of spectrum allocation, that

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[8] "Designated entities" include "small businesses, rural telephone companies and women- and minority-owned firms." Second Order ¶ 6.

the licenses would be awarded to the appropriate entities. *See* Second Order ¶¶ 194, 197-98.[9]

For entities like NextWave that chose to pay the balance of their winning bids in installments, payment of the installments in full was explicitly made a condition of license retention. *See* 47 C.F.R. § 1.2110(f)(4)(iii). When this condition was challenged as a result of the precipitous decline in auction values following the C-block auction, the FCC conducted extensive administrative proceedings on the question and produced three orders declaring that C-block bidders could not keep their licenses without paying the full bid price for them. *See Restructuring Order* ¶¶ 2, 5; *Reconsideration Order* ¶¶ 2, 10; *Second Reconsideration Order* ¶ 1. It sought in this manner to adhere to the fundamental rationale of the competitive scheme: Those qualified bidders who could pay the most were those who should be awarded the licenses. *See Restructuring Order* ¶ 19; *see also Second Order* ¶ 5. These rules and orders, which express the FCC's expert judgment as to the course that would best promote congressional objectives and serve the public interest, thus manifest substantive regulatory decisions about the allocation of spectrum.

Despite the new statutory scheme for allocating spectrum, the FCA draws no categorical distinctions among the three methods of license allocation -- comparative hearing, lottery and auction. Each is presumed to be a regulatory tool for ensuring that licenses are dis-

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[9] The district court below held that the avoidance remedy requested by NextWave had "nothing to do with" the organization, execution, or implementation of the auctions. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 99 Civ. 4439 (CLB), slip op. at 5 (S.D.N.Y. July 27, 1999). *See* infra at 36.

tributed in the way that fulfils the goals of the FCA. *See* 47 U.S.C. § 309(a). And each license, on whatever basis it is awarded, is not to "be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301.

A. The FCC and the Courts

The Supreme Court has emphasized that the FCA's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (internal quotation marks and citation omitted). "Congress assigned to the Federal Communications Commission ... exclusive authority to grant licenses" under the Act. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553 (1990), *overruled on other grounds, Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995). The FCC was "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *Southwestern Cable Co.*, 392 U.S. at 168 (internal quotation marks and footnotes omitted). In this case, we are required to "enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of" radio transmissions. *Pottsville Broadcasting Co.*, 309 U.S. at 136-37.

For over fifty years the Supreme Court has recognized that under the FCA the division of authority between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by ... the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

The FCC's exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use:

> An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.

P & R Temmer v. FCC, 743 F.2d 918, 927 (D.C. Cir. 1984).

If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject.

When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity. Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.

B. The Rulings of the Bankruptcy and District Courts

It is against this background that the inability and consequent failure of NextWave to pay for its C-block Licenses must be considered. The FCC had not sold

NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the Licenses to NextWave. NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, in regulatory terms, that NextWave was not entitled to the Licenses.

NextWave urged the bankruptcy and district courts to treat these proceedings as "a simple bankruptcy case." The courts apparently agreed. The bankruptcy court found that "the issues before [it] . . . concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave] ." *NextWave* V, 235 B.R. at 314. According to the district court, "[t]he claim ha[d] nothing to do with the FCC's 'organization, execution, or implementation' of the radio spectrum auction. Neither d[id] the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses." *NextWave*, No. 99 Civ. 4439 (CLB), slip. op. at 5.

This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives. The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor, any more than it turns an FCC license won at auction into a property estate in spectrum. Nothing about putting spectrum licenses up for auction rendered them anything other than licenses, and the sole responsibility for the allocation of licenses lies with the FCC, with appeal to the courts of appeals, not the bankruptcy or district courts.

By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them.[10] In so doing they exercised the FCC's radio-licensing function. *Cf. National Broadcasting Co.*, 319 U.S. at 224. "[T]he weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance," *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (internal quotation marks and citation omitted), with deferential judicial review reserved to the courts of appeals. But even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, *see NextWave* III, No. 99 Civ. 4439 (CLB), slip. op. at 14; *NextWave* IV.B, 235 B.R. at 311-12, they were utterly without the power to order that NextWave be allowed to retain them for that reason or on that basis. *See Scripps-Howard Radio, Inc.*, 316 U.S. at 14.

This is not to say that these courts lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the ob-

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[10] The rules of construction included within § 309(j) reinforce this understanding. They say, "Nothing . . . in the use of competitive bidding shall . . . (C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). In other words, even when they are *allocated* through the use of competitive bidding, spectrum licenses remain just that, *licenses* subject to regulation and reclamation by the FCC.

ligations between ordinary debtors and creditors. NextWave's arguments that the FCC seeks to frustrate the purposes of the bankruptcy laws are therefore misplaced. We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC.[11]

As Justice Frankfurter noted nearly sixty years ago, "[t]he Communications Act . . . expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Pottsville Broadcasting Co.*, 309 U.S. at 138. In response to changing technological imperatives and policy preferences, Congress and the FCC have chosen to manage the "dynamic aspects" of spectrum allocation in a new way, by employing market forces in an attempt to ensure efficient and publicly beneficial resource allocation. Despite subsequent revolutions in technology, however, the observation of Justice Frankfurter still holds: In order for Congress's prescribed regulatory system to function properly in a dynamic environment, the FCC's allocative decisions must not be interfered with by other instrumentalities of the federal government acting beyond their statutory authority.

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[11] The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors." *NextWave* I, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocator of licenses. Such was the case here. As for NextWave's other creditors, jurisdiction in the bankruptcy and district courts is not created by any interest these creditors might have in NextWave retaining but avoiding payment on the Licenses.

III. Constructive Fraud

While we reverse the district court's affirmance of the bankruptcy court orders issued in the adversary proceeding, and hold that these courts lacked jurisdiction to employ remedies that abrogate the FCC's licensing authority, we recognize that NextWave will remain a debtor in bankruptcy. If the Licenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt. In light of these possible further proceedings, there remains for us the question of the nature of NextWave's obligation, which the bankruptcy court decided, *see NextWave* IV.A, 235 B.R. at 287-91, and which may on remand have substantial effect on the determination of the FCC's rights as creditor.[12] We hold, contrary to the rulings by the bankruptcy and district courts, that NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent.

Under the avoidance provisions of the Code, a transfer or obligation is or is deemed to be a fraudulent conveyance -- and therefore avoidable -- if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. §§ 544, 548(a)(2)(A) (1993 & Supp. 1999).[13] It is un-

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[12] Because the consequences of constructive fraud are not limited to 11 U.S.C. § 544, we believe appellate consideration of this holding is necessary.

[13] Both NextWave and the FCC concede that any choice-of-law questions as to the fraudulent conveyance issue are obviated by the coincidence of § 548, on the one hand, and the

[Footnote continued on next page]

contested that the question of reasonably equivalent value is determined by the "value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of debt* which is challenged." *NextWave* IV.A, 235 B.R. at 290 (citing *In re Best Products Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994)) (emphasis added).

The date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable. If NextWave incurred the obligation at the close of the auctions, then the value of the Licenses would by definition be $4.74 billion, since "the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction." *NextWave* IV.A, 235 B.R. at 297 n.9 (noting NextWave's concession of this point). And if the fair market value was $4.74 billion, then there was no constructive fraud. On the other hand, if the obligation first arose on or about the date on which the Licenses were conditionally granted (following the fall-off in auction prices at the D-, E- and F-block auctions), then the $4.74 billion bid exceeded the fair market value as measured by the subsequent auction prices.

The bankruptcy court held that NextWave's payment obligation did not arise until the conditional grant of the Licenses on January 3, 1997. The court placed great weight on the idea that an obligation evidenced by a writing arises when the writing is delivered:

> Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983); *Barash v. Public Finance*

[Footnote continued from previous page]
applicable New York, California, and Washington, DC laws, on the other. *See NextWave* IV.A, 235 B.R. at 289.

> *Corp.*, 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g., In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982); *In re Smith-Douglass Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84 (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California [Uniform Fraudulent Transfer Act] provides that "[a]n obligation is incurred ... if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code §3439.06(e) (2) [(1997)].

NextWave IV.A, 235 B.R. at 289 (ellipsis and second set of brackets in original).

The obligation to pay the *Notes* attached upon their delivery, as the writing rule confirms, but that observation begs the crucial question: When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

We conclude that NextWave bid $4.74 billion for the right -- excluding other bidders -- to be the qualified licensee of the Licenses, and became obligated to assure payment of $4.74 billion for the Licenses either by cash and credit on delivery or by submitting to liability for

the shortfall if NextWave -- which knew the rules for qualification -- failed to qualify.

Our ruling is based on the FCC's interpretation of its own regulations, to which courts owe deference, but to which the courts below refused deference on grounds we conclude are invalid. The FCC's interpretation is supported, in turn, by the auction law principle that an obligation attaches when the seller no longer can reject the bidder's offer as a matter of discretion.[14]

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[14] Because we believe there are adequate other grounds for reversing the courts below in this case, and because we think the FCC has provided us with a rational interpretation of its regulations that warrants our deference, we do not reach the question of whether federal common law governs auctions conducted pursuant to the FCA in the absence of satisfactory statutory or regulatory guidance. If we were to apply federal common law, it would not be "federal common law in the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of a federal statute, but, rather, to the judicial 'creation' of a special federal rule of decision," *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998) (internal citations and ellipses omitted) (citing *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)), and federal courts often employ federal common law "principles" in interpreting federal statutes. *See, e.g., Burlington* at 2269-70 (agency); *United States v. Bestfoods*, 118 S. Ct. 1876, 1886 n.9 (1998) (discussing veil piercing under CERCLA). In the present case, however, we content ourselves with reviewing and rejecting the conclusions that NextWave claims to draw from the principles of auction law. We refrain from engaging in the kind of "willful policymaking, pure and simple," *Burlington* at 2273 (Thomas, J., dissenting), that might result from drawing intuitively on purported common law "principles." *See Id.* at 2273 (decrying use of "agency principles" drawn entirely from Restatement (Second) of Agency).

A. FCC Regulations

The FCC's rules establish the close of the auction as the time of obligation. The FCC's formal interpretation of its own regulations, albeit issued after the auction, provides that the binding obligation to pay the full bid price attaches to the winning bidder "upon acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Services Licenses*, FCC 98-301 (Dec. 23, 1998), 1998 WL 889489 (F.C.C.) ¶ 1. Other FCC publications clarify that the "acceptance of the high bid" occurs at the close of the auction: "Under the Commission's rules, [the winning bidder] became obligated for its winning bid amounts when the auction closed." *Public Notice, Auction of C, D, E, and F Block Broadband PCS Licenses*, DA-98-2604 (Dec. 23, 1998), 1998 WL 892962 (F.C.C.) at 4. The FCC's interpretation enjoys a presumption of correctness: "We must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ v. Shalala*, 512 U.S. 504, 512 (1994); *accord New York v. Shalala*, 119 F.3d 175, 182 (2d Cir. 1997). It is not this Court's task to choose which among several competing interpretations best serves the stated regulatory purpose; "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (internal quotation marks omitted); *accord New York v. Shalala*, 119 F.3d at 182. This Court defers to the agency's interpretation unless a different reading is compelled by the plain meaning of the regulation or some other indicia of the agency's intent at the time of promulgation. *See Thomas Jefferson Univ.*, 512 U.S. at 512. Deference is especially appropriate where "the regulation concerns 'a complex and highly technical regulatory program.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

In this case, the FCC interprets its regulation to mean that NextWave's obligation attached upon the

close of the auction, and nothing justifies a departure from that interpretation. At the close of the auction NextWave became obligated, if qualified, to pay the $4.74 billion bid price or, if unqualified, to pay a prescribed penalty. The FCC's penalty rules provide that default between the close of the auction and the grant of the Licenses exposes the winning bidder to liability for the amount it bid less the winning bid upon re-auction of the Licenses. *See* 47 C.F.R. § 1.2104(g)(1)-(2). This "penalty" is the functional analog of expectation damages; that is, the FCC must mitigate its harm by a re-auction, but the original winning bidder is liable for any shortfall between the subsequent winning bid and its own. So although labeled a "penalty," this remedy is fully consistent with the notion that the winning bidder becomes liable for full price of the winning bid upon the close of the auction.

The bankruptcy court, however, held that it owed no deference to the FCC's regulations or the Commission's interpretation thereof because (a) the FCC appears in bankruptcy court as a creditor rather than as a regulator, and so is due no more deference than other creditor; and (b) the deference ordinarily afforded the FCC's reading of its rules and the statute it administers is inappropriate (or at least not equally compelled) in this case by reason of the self-serving nature of the FCC's post hoc interpretation.

(a) *The FCC's Creditor Status.* The bankruptcy court treated the FCC as a creditor like any other, and thus refused to allow the FCC to construe its contractual rights (after the fact) in a way that would be binding in the bankruptcy proceeding:

> [T]he FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. Stated simply,

> the FCC's regulations, to the extent that they establish and govern the rights and obligations of the FCC and the licensee in their capacities as creditor and debtor, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis-à-vis its debtor.

NextWave V, 235 B.R. at 317 (emphasis added). This reasoning insufficiently accommodates the dual role that the FCC plays in this proceeding. *See supra* Part II. In granting licenses by auction, the FCC acts as creditor and regulator both. We need not decide what happens at each point of overlap, but the regulatory function is not ended by the bankruptcy of a licensee or license claimant, and as the function persists it must perforce be carried out.

True, the FCC's regulatory interpretation in this case favors the interests of the federal fisc over those of other NextWave creditors: It prevents the bankruptcy court from extinguishing approximately $3.7 billion of debt owed for the Licenses. It does not follow, however, that the FCC's regulatory interpretation is proffered by the FCC as creditor only and not as regulator in whole or part. The FCC's interpretation, which was rejected below as self-serving because it advances the FCC's interest as creditor, also advances important regulatory purposes *See supra* Part II; *Second Order* ¶ 5; *Restructuring Order* ¶ 19.

The bankruptcy court's denial of deference to the FCC was premised on the understanding that the FCC was acting solely as a creditor in this action. Because the FCC was acting in part as a regulator as well as a creditor, we have no occasion to decide here whether the bankruptcy courts owe deference to the regulatory interpretations of agencies acting strictly as creditors. It is possible that in future proceedings the FCC may stand in a strict debtor/creditor relationship to NextWave. But

since we do not know what steps the FCC will take vis-à-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe.[15] *Cf. Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (holding that a request for injunctive relief, made by a bidder at a spectrum auction, was not ripe when the actual order imposing default penalties had not yet issued). We limit ourselves here to finding that NextWave's obligations were incurred at the close of auction and that the transaction in which they were incurred was therefore not constructively fraudulent. Where the regulatory agency acts as both regulator and creditor, we owe deference to its interpretation of its regulations.

(b) *The FCC's Self-Interest.* The courts below emphasized and relied on the self-serving nature of the FCC's interpretation and a perceived lack of connection between its interpretation and the original legislative purpose of the auction regime. We have already noted that the FCC's interpretation, though financially advantageous to the federal government, also furthers regulatory goals. The financial benefits of the FCC's post hoc interpretation do not extinguish the courts' duty to give deference.

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[15] This appeal stems from an adversary proceeding initiated preemptively by NextWave. Because of the ongoing litigation, the FCC has not yet sought to take any action vis-à-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow. We do not know, for example, the size of the penalty the FCC may seek to recover, or even whether it will seek to recover its regulatory penalty, recover on the Notes, or recover on both. It is possible that if the FCC chooses to pursue some of these options -- say, collection on the Notes it may find itself acting as a creditor.

The level of judicial deference depends in part on whether an agency interpretation is consistent or in conflict with the goals of the regulation as stated when it was adopted. *See Thomas Jefferson Univ.*, 512 U.S. at 512. As counsel for NextWave agreed at oral argument before us, one congressional goal in authorizing the FCC to conduct auctions was to achieve fair and efficient allocation of spectrum licenses. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580; *Second Order* ¶ 73. The auction mechanism can do so only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue. And this goal is served only if the high bid entails the obligation to make good the amount bid, either by a qualified bidder's payment on delivery or by payment of any shortfall (upon re-auction) by a bidder who fails to qualify. If the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining valuation is impaired. The FCC's insistence on full payment is consistent with the goals of the auction.

B. Auction Law

The parties and the bankruptcy court make several arguments based on the principles of auction law. We do not think it is necessary to rely on or to appear to create a federal common law of auctions in order to resolve this appeal. We think that the principles of auction law are useful nonetheless, at least insofar as they confirm and reinforce the rationality of the FCC's interpretation of its regulations.

The bankruptcy court held that NextWave gained nothing at the close of the auction except the right to apply for the Licenses, relying upon the following colloquy with counsel for the FCC:

> THE COURT: Wait a second. You're asking for words, namely, "reasonably

> equivalent value" and that raises a question or value for what? And equivalent to what?
>
> [FCC]: To what they got.
>
> THE COURT: What did they get?
>
> [FCC]: What they got was the right to apply for these licenses that were essential to their business. And without those licenses, they would have no business.

NextWave II, 235 B.R. at 274. In summary of the court's reasoning below (which summary may not do the analysis full justice) : Delivery of the Licenses, notwithstanding the auction and NextWave's high bid, remained contingent upon the FCC's determination sometime later that NextWave's application should be granted; the auction was therefore of the kind conducted with a reserve; like such reserve auctions, the high bidder's obligation to pay did not arise when the hammer fell; the reserve in this case was not lifted until at least such time as the FCC decided to deliver the Licenses; and NextWave's obligation to pay the amount of the high bid therefore did not arise until the date on which the Licenses were delivered and the Notes delivered in exchange. We disagree. The close of the auction established the FCC's obligation to grant NextWave the Licenses if the company fulfilled statutory eligibility requirements, and NextWave became liable at that time for full payment on the Licenses at the stated price.

As in contract law more generally, a sale by auction is valid only upon offer and acceptance. *See Blossom v. Railroad Co.*, 70 U.S. (3 Wall) 196, 200 (1865); 7 *Am. Jur. 2d Auctions and Auctioneering* § 20 (1997). As a baseline rule, the close of the auction -- traditionally the drop of the hammer -- signals acceptance of an offer and forms an enforceable contract. *See* 7 *Am. Jur. 2d Auctions and Auctioneering* § 34; 7A *C.J.S. Auctions and Auctioneers* §§ 8, 12 (1980). A bidder has a right to

withdraw the bid at any time before its acceptance. *See Blossom*, 70 U.S. at 206; 7 *Am. Jur. 2d Auctions and Auctioneering* § 33; 7A *C.J.S. Auctions and Auctioneers* § 13. The timing of acceptance, and therefore of the creation of a contractual obligation, is different if the auction sale is conducted "with reserve": "Where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller and the bidder until the seller accepts the bid." 7 *Am. Jur. 2d Auctions and Auctioneering* § 20; *see also Blossom*, 70 U.S. at 206; 7A *C.J.S. Auctions and Auctioneers* § 11.

If by virtue of the required statutory approval, the FCC's spectrum-allocation process became an "auction with reserve," then (under the principles of auction law) NextWave's obligation to pay would not have arisen until the FCC approved the grant of the Licenses to NextWave, *after* the drop in market value reflected in (or precipitated by) the auction of the D-, E- and F-blocks. The finding of constructive fraud rests on that analysis. On the other hand, if the obligation to pay or make good the winning bid arose when the winning bid was announced, *before* the drop in market value, then the obligation NextWave seeks to avoid cannot be characterized as a constructive fraud.

We conclude that the obligations NextWave seeks to avoid arose no later than the announcement of the winning bid, even though the resulting contract had more terms than would be common at the auction of a saleable thing by a private seller. By conducting the auction, the FCC offered to deliver the Licenses to the qualified high bidder. By bidding, NextWave represented that it was qualified to receive the Licenses. By making the high bid, NextWave (a) assumed an obligation to pay a down-payment promptly, (b) assumed an obligation to pay in the future the amount of its bid upon receipt of the Licenses and (c) assumed the risk that it might prove unqualified, by binding itself in that event to pay the

amount of any shortfall in a re-auction of the same Licenses.

The requisite statutory approval by the FCC was not a "reserve" that (until lifted) prevented any enforceable obligation on the part of the high bidder. Auctions with reserve stand or fall as a matter of the seller's discretion, usually on the basis of the pecuniary sufficiency of the bids. *See* 7 *Am. Jur. 2d Auctions and Auctioneering* § 23 (defining the phrase "without reserve" in terms of the seller's right to "withdraw[] the property from sale if he is not pleased with the bids"); *see also Drew v. John Deere Co.*, 241 N.Y.S.2d 267, 269-70 (App. Div. 1963); 7 *Am. Jur. 2d Auctions and Auctioneering* § 21 ("[I]n an auction with a reserve, the auctioneer *may* withdraw the items for auction at any time until he announces completion of the sale." (emphasis added))

The nature of the statutory approval requirement in this case is neither discretionary nor economic. The FCC's act of naming NextWave the winning bidder obligated the FCC to deliver the Licenses to NextWave, at the price determined by NextWave's winning bid, if NextWave fit certain noneconomic qualifying criteria. *See In the Matter of the Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Fifth Report and Order*, FCC 94-178, 9 F.C.C.R. 5532 (July 15, 1994), 1994 WL 372170 (F.C.C.) ¶ 81 ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner."); 47 C.F.R. § 1.2108(d) (1) ("If the Commission determines that . . . an applicant is qualified . . . it will grant the application."). NextWave cites *Mobile Communications Commission v. FCC*, 77 F.3d 1399 (D.C. Cir. 1995), as demonstrating that the FCC has no obligation to grant the license at the bid-upon price. *MCC v. FCC*, however, dealt not with the FCC's decision that a bid price was insufficient but with the FCC's determination that the licensee was ineligible for a "pioneer's preference"

and thus had to pay for its license. *See id.* at 1408-09. The case is inapposite.

NextWave knew about the statutory criteria for approval before the bidding began. *See* 47 C.F.R. § 310(b)(4) (1991); 47 C.F.R. §§ 24.709, 24.712, 24.720 (1996). In the event, the only obstacle to closing encountered by NextWave was its own noncompliance with the foreign ownership requirements. NextWave's willingness to bid notwithstanding the undisputed fact that noncompliance would prevent delivery of the Licenses and compel NextWave to insure the government against a lower high bid at re-auction demonstrates that NextWave assumed the risk of its own non-compliance.

True, there appears to be an element of discretion in the FCC's decision to grant the Licenses conditionally, pending NextWave's compliance with statutory requirements. However, that conditional grant was temporary, *see In re Applications of NextWave Personal Communications, Inc. for various C-Block broadband PCS Licenses*, DA 97-328 (Feb. 14, 1997), at 2, and the FCC had no power to waive the statutory requirements permanently. Moreover, it was a temporary discretionary *approval*; the FCC had no authority to *reject* NextWave's bid as a matter of discretion.

Thus the FCC was obligated to deliver the Licenses at the agreed-upon price if NextWave could demonstrate that it met certain statutory and regulatory eligibility requirements, and NextWave assumed the risk of its failure to do so. The FCC was bound, and so was NextWave. After acceptance of the offer, "as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid." 7 *Am. Jur. 2d Auctions and Auctioneering* § 20 (1997); *see also Blossom*, 70 U.S. at 206.

The FCC's dual role in the licensing process -- as offeror in the auction and as regulator thereafter -- confers on the FCC prerogatives that are not enjoyed by the

ordinary seller. The FCC thus retains the authority to reject a high bid for *regulatory* purposes. But NextWave knew, at the time of the auction, that the winning bidder would look to the FCC both as creditor and as regulator. If NextWave objected to the conditions imposed by the FCC or to the FCC's dual role in the transaction, NextWave could have refrained from participating in the auction.

The point is well illustrated in *United States v. Weisbrod*, 202 F.2d 629, 633 (7th Cir. 1953). In a surplus auction conducted near the end of World War II, the federal government reserved a unilateral right to withdraw from sale certain chemicals and drugs, even after accepting the winning bid. *See id.* at 630. When the government sued the winning bidder for default, the bidder defended on the ground that the contract was defective for failure of mutuality. *See id.* at 631. The Seventh Circuit affirmed the finding of liability for breach, *see id.* at 633, on the ground that a condition made known to the buyer --even the unilateral right of the seller to withdraw from the contract -- did not abrogate the buyer's obligation to perform. *See id.* at 632-33. "If one does not wish to bid . . . with the conditions attached, his alternative is to make no bid." *Id.* at 633, on the ground that a condition made known to the buyer -- even the unilateral right of the seller to withdraw from the contract – did not abrogate the buyer's obligation to perform. *See id.* at 623-33. "If one does not wish to bid . . . with the conditions attached, his alternative is to make no bid." *Id.* at 633.[16]

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[16] Cases cited by NextWave to support the contrary argument, which concern auctions with reserve, are not on point. *See, e.g., Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 520-21 (1925); *Ferry v. Udall*, 336 F.2d 706, 709 (9th Cir. 1964).

CONCLUSION

We hold that the bankruptcy and district courts had no power to interfere with the FCC's system for allocating spectrum licenses and that, in any event, the courts erred in determining that NextWave's payment obligation was constructively fraudulent. We therefore reverse the judgment of the district court affirming the five orders of the bankruptcy court and remand for further proceedings consistent with this opinion, if any are necessary. The mandate shall issue forthwith.

In re NEXTWAVE PERSONAL COMMUNICATIONS, INC. et al., Debtors.

NextWave Personal Communications, Inc., Plaintiff-

v.

Federal Communications Commission,

Defendant-Appellant.

99 Civ. 4439 (CLB), 98 B 21529 (ASH)

United States District Court,

S.D. New York.

July 27, 1999

Deborah Schrier-Rape, Andrews & Kurth, Dallas, TX, for NextWave Personal Communications, Inc.

Daniel S. Alter, Mary Jo White, New York City, for Federal Communications Commission.

MEMORANDUM & ORDER

BRIEANT, District Judge.

This appeal challenges five decisions and orders of the Bankruptcy Court, issued in a Chapter 11 Proceeding by the Honorable Adlai S. Hardin, United States Bankruptcy Judge, dated December 7, 1998, February 16, 1999, April 2, 1999, May 12, 1999 as supplemented on June 22, 1999, and June 16, 1999, rendered in the Adversary Proceeding of NextWave Personal Communications, Inc. ("NextWave") against the Federal Communications Commission (the "FCC") (the "Adversary Proceeding"). On June 22, 1999, Defendant-Appellant FCC filed its brief; on July 2, 1999, Plaintiff-Appellee NextWave filed its brief; and on July 8, 1999, the FCC filed its reply brief. On July 15, 1999, this Court heard oral argument on the appeal and reserved decision. Thereafter, on July 20, 1999, NextWave submitted a letter brief addressing certain concerns raised by the Court at oral argument.

Familiarity of the reader with the decisions of Judge Hardin is assumed.

In an appeal of a Bankruptcy Court's decision and order, this Court reviews findings of fact for clear error, *see In re Artha Management, Inc.*, 91 F.3d 326, 328 (2d Cir. 1996), and conclusions of law *de novo*, *see In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d Cir. 1992).

FACTUAL BACKGROUND

The Facts relevant to this appeal are not disputed significantly. In 1993, after investigation and discussion, the House Committee on Energy and Commerce (the "Committee"), concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants [for electromagnetic spectrum licenses] can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of public airwaves.

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 580. In response, Congress passed the 1993 amendments to the Federal Communications Act (the "FCA"), which added section 309(j). *See* 47 U.S.C. § 309(j). Section 309(j) granted the FCC the power to conduct competitive bidding auctions to sell the right to apply for "blocks" of airspace or radiobands. As part of the program, the FCC was to designate certain blocks for auction to small, emerging businesses and to provide flexible, deferred payment plans to such small businesses. *See* 47 U.S.C. § 309(j)(3)(B) and (4)(D). Pursuant to Congress' mandate, the FCC created a competitive bidding auction system and designated the "C Block" for auction to small businesses providing Personal Communication Services ("PCS"), a new form of

wireless communication technology. Maximizing revenue was proscribed explicitly as an objective of such system.

On May 6 and July 16, 1996, the FCC ran auctions for C Block licenses at which NextWave won the right to apply for sixty-three C Block licenses by bidding $4.7 billion. NextWave put down the required deposit of $474 million (10% of the winning bid) and proposed a payment plan at below-market interest rates for the remaining $4.26 billion. NextWave submitted applications for the licenses for review and approval by the FCC. On January 3, 1997, the FCC approved NextWave's applications and soon thereafter sent to NextWave a series of promissory notes for a total of $4.26 billion, dated January 3, 1997. NextWave executed the notes on February 19, 1997.

Before approving the C Block licenses for NextWave, the FCC conducted auctions for "D, E & F Block" licenses, resulting in much lower bids for the rights to apply for the same or similar licenses. As a consequence of the gross disparity between the bids on the C Block licenses and on the D, E and F Block licenses, 90% of the winning bidders from the C Block auction were unable to obtain financing for their payment plans. The FCC thereafter promulgated voluntarily two restructuring orders (the "Restructuring Orders") that offered the C Block license-holders four options to restructure their debt. NextWave informed the FCC that the four options were not commercially viable and on May 8, 1998, requested an alternative restructuring. The FCC refused and NextWave appealed that decision to the Circuit Court of Appeals of the District of Columbia and requested a stay of the June 8, 1998 deadline to elect one of the four options. The Court of Appeals denied the request for a stay.

On June 8, 1998, NextWave, unable to finance its enormous debt to the FCC and severely undercapital-

ized, declared Chapter 11 Bankruptcy and filed the Adversary Proceeding that is the subject of this appeal.

DISCUSSION

December 7, 1998 Decision Granting in Part and Denying in Part the FCC's Motion to Dismiss

The First Amended Complaint of NextWave contained two claims, the first for constructive fraudulent conveyance subject to avoidance under 11 U.S.C. § 544 and the second for equitable subordination based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning other licenses before applying all of the C Block licenses. The Bankruptcy Court dismissed NextWave's second claim for lack of subject matter jurisdiction and NextWAve has not appealed. Thus, dismissal of that claim is not under review.

The Bankruptcy Court denied the FCC's motion to dismiss NextWave's claim for constructive fraudulent conveyance. The FCC asserted (1) that the Bankruptcy Court and District Court lack subject matter jurisdiction over NextWave's claim because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the Circuit Courts of Appeals, 28 U.S.C. § 2342; 47 U.S.C. § 402; and (2) that the FCA preempts state fraudulent conveyance claims. The Bankruptcy Court held that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. As to the preemption claim, the Bankruptcy Court concluded that nothing in the FCA conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to exclude licensees from access to the Bankruptcy Court.

The Bankruptcy Court reasoned, and this Court agrees, that the fraudulent conveyance claim does not seek to litigate any issue with respect to the regulatory power granted the FCC by Congress. The claim has nothing to do with the FCC's "organization, execution,

or implementation" of the radio spectrum auction. Neither does the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses. The claim seeks the equitable remedy of avoidance available under 11 U.S.C. § 544 for the benefit of other creditors and the debtor, and implicates regulations and orders relevant to the FCC only in its role as creditor.

Although Congress has granted the FCC the regulatory power to control the issuance and use of these licenses, it did not grant regulatory power to the FCC to make rules or orders with respect to its own status as a creditor vis-à-vis its debtors or other creditors of its debtors. The FCA specifically directs that the mandate to the FCC is not to collect revenue, and as the FCC cites in its brief, section 309(j) "alters only the licensing process, and has no effect on the requirements, obligations or privileges of license holders." 1993 U.S.C.C.A.N. at 585. The FCC argues that its powers to direct a debtor to pay the full amount of its debt, regardless of whether the debtor is in bankruptcy, derives from other sections of the FCA. Section 309(j) states, "Nothing in this subjection, or in the use of competitive bidding, shall diminish the authority of the [FCC] under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). But the FCA does not provide for the FCC's current method of "reclamation" wherein the FCC is attempting "to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws." (December 7, 1998 Bankruptcy Decision & Order).

The regulations outlining the steps to be taken by the FCC in the event of a default in payment of the installment notes are provisions of a contract between a creditor and debtor. As such, they are subject to revision and adjustment pursuant to the Bankruptcy Code, just as any similar debt. In any event, NextWave did not

default, those steps were never taken, and no penalty was ever assessed.

The Restructuring Orders were the voluntary offers of a creditor to protect the solvency of its debtor in order to assure payment. Not only were these orders promulgated by the FCC in its capacity as a creditor, but also NextWave is not challenging the propriety of those orders, which provide relief to those who find it commercially viable and desire to take the benefit of such orders. NextWave is challenging the right of the FCC as a creditor of a bankrupt entity to recover on a fraudulently incurred obligation. As the Supreme Court stated in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979),

> When the United States acts as a lender or guarantor, it does so voluntarily, with detailed knowledge of the borrower's financial status. The agencies evaluate the risks associated with each loan, examine the interests of other creditors, chose the security believed necessary to assure payment, and set the terms of every agreement . . . . The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judicially supports the view that it did not intend to confer special privileges on agencies that enter into the commercial field.

Id. at 736-37, 99 S. Ct. 1448. The regulations and orders noted above were the actions of a creditor who happens to be a federal agency. As a creditor and as a federal agency, the FCC is subject to the Bankruptcy Code. *See* 11 U.S.C. § 106(a) (providing that federal agencies are subject to § 544 claims). Congress could

have exempted but did not exempt the FCC from the Bankruptcy Code.

The Bankruptcy Code confers upon the district courts and bankruptcy courts exclusive jurisdiction to administer the Bankruptcy Code and Rules and to resolve claims, adversary proceedings and contested matters arising under the Code. Specifically, 28 U.S.C. § 157(b)(2)(H) grants the Bankruptcy Court jurisdiction to determine "proceedings to determine, avoid, or recover fraudulent conveyances." The Bankruptcy Court therefore held that the constructive fraudulent conveyance dispute tendered by the Adversary Proceeding was within the subject matter jurisdiction of the Bankruptcy Court, and this Court agrees.

This Court also agrees that the FCA does not preempt the Bankruptcy Code or state fraudulent conveyance law. As this Court has already stated, Congress must expressly exempt federal agencies from application of the Bankruptcy Code and Congress has not exempted the FCC. In addition, the FCA makes absolutely no attempt to regulate debtor-creditor relations.

Section 544 of the Bankruptcy Code provides that the court should use "applicable law" in determining whether a constructive fraudulent conveyance has occurred. Applicable law is generally state law, unless state law is preempted by federal law or state law is found to be inappropriate because of the involvement of the federal government as creditor (*See infra*). With regard to preemption, the FCA provides:

> **State Preemption. (A)** Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate *the entry of or the rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a

> State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3). This provision does not explicitly preempt state fraudulent conveyance law. Moreover, state fraudulent conveyance law does not actually conflict with the FCA. It may conflict with self-interested regulations promulgated by the FCC in its capacity as a creditor, but those regulations were not promulgated pursuant to the FCA and are not about "frequency allocation, over which federal control is clearly exclusive." Head v. New Mexico Board of Examiners, 374 U.S. 424, 430 n.6, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963).

February 16, 1999 Decision Determining the "Effective Date"

The FCC brought a motion for summary judgment to determine the "effective date" for purposes of § 544(b) of NextWave's $4.74 billion obligations. Under § 544(b), the "effective date" is the date that the "obligation [was] incurred." § 544(b). The Bankruptcy Court determined that the effective date was at the earliest January 3, 1997, which is the date the FCC approved NextWave's application for the sixty-three C Block licenses and the date of the promissory notes. The FCC argues, however, that the effective date is the date NextWave won the bids at auction on May 8 and July 23, 1996.

The obligation sought to be avoided is not any of the obligations incurred when the auction ended, but rather the obligation to pay the FCC the winning bid amount for the sixty-three licenses, which arose at the time the licenses were issued or the notes were executed. According to the FCC regulations, the winning bidder must apply for the license, which may or may not be granted because the public and other aspirants have the right to oppose the grant. Before the granting of the application and issuing of the licenses, there is no property to be

valued. If the bidder is disqualified or defaults in connection with the application, the FCC may assess a penalty in the amount of the difference between the price ultimately received on resale and the original bidder's bid. Thus, the obligations incurred at auction are the obligations to pay any penalties assessed by the FCC. No penalties were assessed, so that obligation was never incurred. The obligation to pay the total winning bid price is not incurred until the application is processed and granted, and the licenses are thereby transferred to the bidder. Based on this reasoning, the findings of fact by the Bankruptcy Judge that the obligation was not incurred until administrative approval or grant of the licenses, here no earlier than January 3, 1997, is at the very least not clearly erroneous.

April 2, 1999 Oral Decision Denying Dismissal

The FCC moved for judgment on the pleadings for failure to state a claim under federal common law as set out by the Ninth Circuit Court of Appeals in *Kupetz v. Wolf*, 845 F.2d 842 (9th Cir. 1988). The FCC argued that because the avoidance claim challenges NextWave's contractual obligation to the United States pursuant to a national statutory scheme for regulating the commercial use of radio spectrum, federal common law should apply. The FCC also argued that the court should apply the *Kupetz* rule of federal common law, that a claim for fraudulent conveyance will not lie if subsequent creditors were on notice of the risks of the conveyance.

On April 2, 1999, the Bankruptcy Court heard oral argument and ruled in an oral decision that it would not invent federal common law or apply the version presented by the FCC. The Bankruptcy Court reasoned, and this Court agrees, that federal common law is applied where application of existing state or federal law would undermine a federal regulatory program. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604, 93 S. Ct. 2389, 37 L. Ed. 2d 187 (1973)

("[S]tate law may be found an acceptable choice, . . . even when the United States is a contracting party. However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program."). In this case, the application of 11 U.S.C. § 544(b) and thereby state fraudulent conveyance law will not abrogate the explicit terms or purposes of the regulatory scheme embodied in Section 309(j) or other sections of the FCA.

This Court also agrees that even if the Bankruptcy Court had concluded that the "applicable law" is federal common law, the rule articulated in *Kupetz* is not the proper federal common law to apply to this case. The great majority of the creditors in this case extended credit before the auction, and before the licenses were issued and the allegedly fraudulent obligation was incurred. Therefore, NextWave's other creditors are not subsequent creditors with notice comparable to the creditors in *Kupetz*.

May 12 and June 22, 1999 Findings of Fact and Conclusions of Law After Trial

In the May 12 opinion, the Bankruptcy Court determined that the material elements of a fraudulent conveyance claim are the same under any law which could apply, that is, California law, New York law, District of Columbia law, and the Bankruptcy Code § 548. Applying those elements, the Bankruptcy Court found after trial that NextWave had proved its claim for constructive fraudulent conveyance. In the June 22 supplemental opinion, the Bankruptcy Court granted the remedy provided by § 544, that is, avoidance to the extent allowed under applicable law. The Bankruptcy Court determined under California law that the obligation was incurred on February 19, 1997, the date the notes were executed and went into effect. On that date, the C Block licenses were worth $1,023,211,000. All obligations

beyond this amount were represented by the payments and notes held to be fraudulently conveyed. Thus, NextWave's non-fraudulent obligation was held to be $1,023,211,000. NextWave is thus currently obligated to pay $1,023,211,000 minus the amount paid as down-payment, $474,364,806, leaving a total current obligation of $548,846,194.

Other than its argument that the Bankruptcy Court should apply federal common law, which the Bankruptcy Court rejected in its April 2, 1999 Oral Decision, the FCC does not dispute the material elements of a fraudulent conveyance claim applied by the Bankruptcy Court to the facts determined at trial. This Court addressed and rejected this argument in its discussion of the April 2, 1999 Oral Decision and need not revisit it in the context of the Bankruptcy Court's Findings of Fact and Conclusions of Law after trial. The uncontested elements are as follows: NextWave must prove that (1) it incurred an obligation (2) at a time when it was engaged or was about to engage in a business or transaction for which the remaining assets of NextWave were unreasonably small in relation to the business or transaction, or intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due (3) for which it did not receive reasonably equivalent value.

Other than its argument that the Bankruptcy Court should find that the effective date was the date of the auction, which the Bankruptcy Court rejected in its February 16, 1999 Summary Judgment Decision, the FCC does not contest the Bankruptcy Court's finding that NextWave incurred an obligation on February 19, 1997.[1] Again, this Court addressed and rejected this ar-

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[1] There seems to be no material difference in the value of the licenses if the date of January 3, 1997 were to be used.

gument in its discussion of the February 16, 1999 Summary Judgment Decision and need not revisit it in the context of the Bankruptcy Court's Findings of Fact and Conclusions of Law after trial.

The FCC stipulated before trial to the second element of the claim that NextWave was insolvent on January 3 and February 14 and 19, 1997, and on June 8, 1998. The FCC does not contest the valuation of the licenses as of February 19, 1997, or the resultant conclusion that NextWave did not receive reasonably equivalent value for the obligation incurred. Thus, in challenging the Bankruptcy Court's Findings of Fact and Conclusions of Law, the FCC is really challenging only the remedy imposed by the Bankruptcy Court.

The FCC argues that the Bankruptcy Court in fashioning its remedy failed to harmonize the FCA with the Bankruptcy Code because it "failed to recognize that the potential benefits of allowing NextWave to reorganize pale in comparison with the negative ramifications that follow from permitting spectrum licensees to avoid critical provisions of their regulatory agreements with the FCC by declaring bankruptcy." (Brief of Defendant-Appellant). The FCC asserts that allowing NextWave to keep the sixty-three licenses for a reduced obligation undermines the integrity, reliability and purpose of the regulatory scheme for competitive bidding, creates perverse incentives for bidders to bid to win while never intending to pay the bid but rather intending to go into bankruptcy after the auction, and hurts those who bid for but did not win the licenses when they were willing to pay much more than NextWave is now obligated to pay.

It is true that the Bankruptcy Court was required to balance the two enactments and "give effect to both if possible." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). It is also true that the Bankruptcy Court did just that. The Bankruptcy Court spent three pages of its opinion delineating how its chosen remedy would fulfill the objectives of the

Bankruptcy Code and § 309(j) of the FCA. This Court agrees that the remedy that best balances the objectives of the Bankruptcy Code and the FCA is avoidance of so much of the obligation as was fraudulently conveyed.

Section 544 provides specifically for the remedy of avoidance for a fraudulent conveyance: "The trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b). Although the entire obligation is voidable, *In re Acequia, Inc.*, 34 F.3d 800, 809-10 (9th Cir. 1994), the good faith obligee has the right to assert a claim for the value of the property transferred: "[T]o the extent a[n] . . . obligation is voidable under section 544 . . . a[n] obligee . . . that takes for value and in good faith . . . may enforce any obligation incurred . . . to the extent that such . . . obligee gave value to the debtor in exchange for such . . . obligation." 11 U.S.C. § 548(c). If NextWave were required to return the licenses, the Company would be forced into dissolution. The remedy of avoidance of only the portion of the obligation that was fraudulently incurred is the statutory remedy and such remedy promotes equitable distribution among creditors and other parties by returning fraudulently transferred property to the estate and fosters the overall bankruptcy policy favoring reorganization over dissolution. *See In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (noting policy favoring rehabilitation and reorganization evidenced by Bankruptcy Code and affirming 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996) ("Public Policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values.")); *see also In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996) (noting same policy).

The objectives of Congress in enacting § 309(j) are the development and rapid deployment of new technology for the benefit of the public, the promotion of com-

petition to ensure the efficient and intensive use of the spectrum, the provision of opportunity for small businesses to enter the field, and the recovery for the public of a portion of the value of the spectrum. *See* 47 U.S.C. § 309(j)(3). The remedy fashioned by the Bankruptcy Court supports these objectives. NextWave has invested millions of dollars in researching new technology and preparing a network that can utilize best the licenses it has. It is a small, innovative business with employees and small creditors as well as large creditors like the FCC. Allowing NextWave to keep and use the licenses promotes rapid deployment of technology without the delay of reauction and development of a new network by another company. It promotes small business entering a field with high barriers to entry. It allows the public to recover more than a portion of the current value of the spectrum licenses; the public is recovering more than two times the current value of the spectrum licences.

Also, Congress made clear that maximizing revenue cannot be an objective. The FCC is recovering more than the value of the spectrum and should not now be trying to maximize revenue by trying to recover the winning bid.

The remedy fashioned by the Bankruptcy Court at the same time does not undermine the objectives of § 309(j). The FCC's assertions to the contrary are not persuasive. First, a company generally does not intend to jump into bankruptcy as part of its business plan. Bankruptcy is bad business. It is a laborious process in which reorganization is not always possible and the company's reputation may be destroyed. When and if a hypothetical bidder that would bid without intending to perform comes on the scene, the Bankruptcy Court as a court of equity can deal with the problem. This is not such a case, and the wisdom and propriety of the remedy must be reviewed in light of the facts of the actual case before Judge Hardin.

Second, the Bankruptcy Court found, and the FCC does not contest, that

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date, nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the FCC have been placed in service.

(May 12, 1999 Bankruptcy Decision). Thus, the C Block auction was a disaster for every participant. Those who bid but did not win are lucky, not hurt. They had the opportunity to bid at the D, E and F Block auctions and receive equivalent licenses for a fraction of the price NextWave is paying, even after the decision reducing its obligation. And if they had won the bid at the C Block auction, likely they would be in bankruptcy right now. The integrity and reliability of the C Block auction is not undermined by an avoidance remedy; it was undermined by the fact that 90% of the winning bidders are now bankrupt and/or paying an outrageously inflated price. The FCC has not since run another auction like the C Block auction.

The Court thus agrees that the remedy fashioned by the Bankruptcy Court "is intuitively fair and equitable to both the government and the debtor's estate and implements both the letter and spirit of the Federal and state statutes and the case law governing debtor-creditor relations." (June 22, 1999 Bankruptcy Supplemental Decision). In addition, the remedy supports rather than undermines the objectives of the FCA, particularly § 309(j).

June 16, 1999 Decision Denying Motion to Lift Automatic Stay

The Bankruptcy Court denied the FCC's motion to lift the automatic stay under 11 U.S.C. §362(d)(1) for "cause." The FCC's asserted "cause" for a lift of the automatic stay was that by reason of the May 12 and June 22 opinions, NextWave would not be paying the full amount of its winning bids in the C Block auction, and thus would be defaulting. According to the FCC, the FCC therefore should be able to pursue the remedy set out in its regulations, that is, return of the licenses and foreclosure on the $4.26 billion allegedly outstanding. The FCC asserts that the automatic revocation of licenses and pursuit of debt collection procedures upon default are "mandated" by FCC regulations on the auction process and it should be allowed to proceed.

The FCC fails to present cause for a lift of the automatic stay. As this Court has stated previously, the [sic] FCC regulations on automatic revocation and pursuit of debt collection are not part of the auction process; they are the FCC's rules governing its status as a creditor of licensees. Congress did not exempt the FCC from the Bankruptcy Code or grant the FCC the power to determine debtor-creditor relations. As such, the FCC is to be treated in this context as any other creditor. At present, NextWave's obligation has been reduced and it is not in default on the reduced obligation. There is no reason to believe that it will default. Indeed, it is highly likely that the debtor will confirm a plan of reorganization and will stay in business, putting the sixty-three licenses at issue in this case to good use for the benefit of creditors, employees, and the public at large. This fulfills the primary objective of the Bankruptcy Code to rehabilitate debtors for the benefit of all. *See In re Chateaugay Corp.*, 89 F.3d at 949; 201 B.R. at 72 ("Public Policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilita-

tion of troubled companies and concomitant preservation of jobs and going concern values.").

CONCLUSION

For the foregoing reasons, the decisions and orders of the Bankruptcy Court in the Adversary Proceeding are affirmed.

SO ORDERED.

In re NextWAVE PERSONAL COMMUNICATIONS, INC., et al., Debtors.

Bankruptcy No. 98 B 21529(ASH)

United States Bankruptcy Court
S.D. New York.

235 B.R. 314

June 16, 1999

Andrews & Kurth L.L.P., by Deborah L. Schrier-Rape, Gregory Bevel, Dallas, TX, for debtors.

Mary Jo White, United States Attorney for the Southern District of New York by Daniel S. Alter, New York City, defendant.

DECISION DENYING MOTION TO LIFT THE AUTOMATIC STAY

ADLAI S. HARDIN, Jr., Bankruptcy Judge.

Following this Court's decision dated May 12, 1999 (the "May 12 Decision") sustaining the constructive fraudulent conveyance claim of debtor NextWave Personal Communications, Inc. ("NPCI"), the Federal Communications Commission ("FCC") has moved to lift the automatic stay under 11 U.S.C. § 362(d)(1) for "cause." The alleged "cause" is that, by reason of the May 12 Decision, NPCI will not be paying the full amounts of its winning bids in the C block auction for 63 spectrum licenses awarded to it by the FCC.

For the reasons stated below, the motion is denied.[1]

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[1] The Court has jurisdiction of the debtor's Chapter 11 case and this contested matter by reason of 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference dated July 10, 1984 signed by Acting Chief Judge Robert J. Ward. This is a core proceeding under 11 U.S.C. § 157(b)(2).

In addition to the May 12 Decision, of particular relevance to this motion is this Court's Revised Decision on Motion to Dismiss dated December 7, 1998 (the "December 7 Decision"), which granted in part and denied in part the FCC's motion to dismiss for lack of subject matter jurisdiction NPCI's adversary proceeding against the FCC. To avoid unnecessary repetition in this decision, familiarity with the December 7 Decision and the May 12 Decision is assumed.

NPCI's winning bids for the 63 spectrum licenses in the C block auction and reauction ending May and July 1996 totaled $4.7 billion, an average of $1.53 per MHz/Pop. The C block licenses were not awarded to NPCI until January 1997. The FCC's auction of D, E and F block licenses commenced in September 1996 and concluded in mid-January 1997. The average price bid per MHz/Pop for D, E and F block licenses was $0.33. The prices bid in the D/E/F block auction and other factors[2] undermined the public perception of the value of the C block licenses and made it impossible for the winning C block licenses to raise any money in the public market necessary to build out their wireless systems as required under the FCC license regulations. *See* C.F.R. § 24.203.

NPCI filed its Chapter 11 petition on June 8, 1998 and, the same day, filed its adversary proceeding against the FCC seeking, *inter alia*, to declare voidable its $4.7 billion bid obligation as a constructive fraudulent conveyance under 11 U.S.C. § 544. In the May 12 Decision this Court sustained the constructive fraudulent conveyance claim based upon findings that the total value received by NPCI in exchange for its payment obligation to the FCC was $1.023 billion. As a consequence of the May 12 Decision and the Court's Decision on Remedy,

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[2] *See* May 12, Decision at footnote 11.

the NPCI's payment obligation to the FCC will be reduced from $4.7 billion to $1.023 billion.

The FCC's motion to lift the automatic stay is based upon (i) the fact that NPCI will not be paying the full $4.7 billion that it bid for its 63 C block licenses and (ii) the FCC's own regulations.

The FCC's regulations conditioned the grant of C block licenses upon the licensee's "full and timely payment of the winning bid." 47 C.F.R. 24.708(a); *see also* 47 C.F.R. § 1.2109(a) (1996) (same). In circumstances where the regulations permit certain designated entities such as NPCI to pay the full amount of their high bids in installments over the term of their licenses, 47 C.F.R. § 1.2110(e) (1996), a license "granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. § 1.2110(e)(4) (1996). In the event of default by the licensee, "the licensee will automatically cancel and the Commission will initiate debt collection procedures." 47 C.F.R. § 1.2110(d)(4)(iii) (1996).

Asserting that the requirement that a licensee pay its winning bids in full "is the keystone of the FCC's spectrum auction program" (FCC Memo at 2),[3] the FCC argues in substance that the provision in the regulations for automatic cancellation of NPCI's licenses upon default in NPCI's payment obligation constitutes "cause" under Section 362(b)(1) of the Bankruptcy Code for relief from the automatic stay to permit the FCC, in effect,

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[3] This assertion may be viewed with some skepticism in view of the FCC's oft-repeated acknowledgement that revenue generation for the Federal government is not the primary objective of Section 309(j) of the FCA and the FCC's auction regulations.

to reclaim the "cancelled' licenses and otherwise pursue its remedy under its regulations.

The issue thus raised is closely related to the issues raised in the FCC's initial motion to dismiss for lack of subject matter jurisdiction. For this reason, the analysis in the December 7 Decision largely disposes of the FCC's contentions on this motion. To summarize that Decision, Section 309(j) of the Federal communications Act ("FCA") provides the statutory authority for the FCC's spectrum auction program, including the authorization to grant special financing incentives to designated entities through deferred payment in installments. In so doing, Congress authorized the FCC not only to act in its capacity as a regulator of spectrum licenses, but also to become a creditor of licenses qualifying as designated entities. However, nothing in Section 309(j) or elsewhere in the FCA granted the FCC acting in its capacity as a creditor, any rights, privileges or obligations superior to or different from the rights, privileges and obligations of other creditors. More specifically, nothing in the FCA or elsewhere granted the FCC acting as a creditor any exemption from the provisions of the Bankruptcy Code, and Congress has declined to grant any such exemption despite the FCC's attempts to lobby for such an exemption.

With this perspective, the FCC's contentions on this motion may be easily resolved. Like any other creditor, the FCC is subject to the avoidance powers provided in Sections 544 and 548 of the Bankruptcy Code. As would be the case with any other creditor in similar circumstances, for the reasons set forth in the May 12 Decision NPCI's aggregate bid obligation to the FCC of $4.7 billion was subject to avoidance to the extent of $3.7 billion. As a consequence, NPCI's "payment obligations" to the FCC have been reduced from $4.7 billion to $1.023 billion, of which some $473 million has already been paid. The balance will have to be paid by NPCI under the installment plan authorized by Congress

and implemented by the FCC regulations. Of course, if NPCI were to default in the future in its payment obligation on the balance, its spectrum licenses would then be subject to automatic cancellation under 47 C.F.R. § 1.2110(e)(4)(iii). But for the present NPCI is not in default. Unless and until NPCI defaults in "the full and timely performance of [its] licensee's payment obligations under the installment plan," there is no default and, therefore, no "cause" to lift the automatic stay under 11 U.S.C. § 362(d)(1).

The FCC argues that its regulations condition grant of the licenses upon "full and timely payment of the *winning bid amount*" (emphasis supplied), citing to the language in Section 24.708(a) of 47 C.F.R. NPCI retorts that the automatic cancellation provision in Section 1.2110(e)(4)(iii) refers to default in the "full and timely performance of the licensee's *payment obligations*" (emphasis supplied). But the difference in wording between "winning bid amount" and "payment obligations" is immaterial. Whatever the verbiage, the substance of the matter is that the FCC's right to payment as a creditor is subject to avoidance under the relevant Bankruptcy Code provisions just like the right to payment of any other creditor.

Nor is it material that the FCC has provided in its regulations that the grant of the licenses is conditioned upon full payment of either the licensee's "winning bid amount" or "payment obligations," or that the regulations provide for automatic cancellation of the licenses upon default. Aside from the fact that there has been no default by NPCI, the FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. Creditors' rights under their contracting documents are frequently subject to modification under provisions of the Bankruptcy Code such as the avoidance powers in Sections 544 and 548. Stated

simply, the FCC's regulations, to the extent that they establish and govern the rights and obligations of the FCC and the licensee *in their capacities as creditor and debtor*, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis a vis its debtor. As stated in the December 7 Decision:

> The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors. . . . Nothing in Section 3090 or elsewhere in the FCA even suggests that Congress intended to empower the FCC to promulgate orders [or regulations] which have nothing to do with its regulatory functions and which are designed solely to enhance the FCC's position as a creditor to the detriment of rights provided under the Bankruptcy Code for the benefit of other creditors and the debtor.

The cases relied upon by the FCC do not support its position. For the contention that "[t]hese regulatory conditions upon the Licenses remain fully enforceable by the FCC even though NextWave is in bankruptcy" (FCC Memo at 2) the FCC cites *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986), where the Ninth Circuit said "the estate takes the license subject to the restrictions imposed on the debtor by its transferor." To the same effect the FCC cites *In re Bay Ridge Inn, Inc.*, 94 F.2d 555 92d Cir. 1938). As pointed out in NPCI's opposing memorandum, both *Farmers Market* and *Bay Ridge* concern sale or transfer of liquor licenses from one party to another, with direct implication of the governmental regulatory power. Similarly, the case of *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989), concerns the FAA's power under regulations respecting the

use of airport slots not being used by the debtor airline and having nothing to do with any debtor-creditor relationship. By contrast, the regulations relied upon by the FCC in this case are concerned solely with the debtor-creditor relationship between the parties and do not implicate the FCC's regulatory jurisdiction.

To summarize, the FCC is subject to the provisions of the Bankruptcy Code in its capacity as a creditor. NPCI's payment obligations to the FCC in respect of its winning bids on C block licenses have been modified in accordance with the avoidance provisions of Section 544 of the Bankruptcy Code. The modification of the FCC's rights as a creditor in accordance with the Bankruptcy Code does not constitute a default by NPCI, and NPCI is not in default in respect of its modified payment obligations. Accordingly, there is no "cause" to lift the automatic stay under Section 362(d)(1), and the FCC's motion must be denied.

In re NextWAVE PERSONAL COMMUNICATIONS INC., et al., Debtors.

NextWave Personal Communications, Inc., Plaintiff,

v.

Federal Communications Commission,

Defendant.

Bankruptcy No. 98 B 21529 (ASH)
Adversary No. 98-5178A

United States Bankruptcy Court,
S.D. NEW YORK,
White Plains Division.

235 B.R. 277

May 12, 1999

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DECISION ON CONSTRUCTIVE FRAUDULENT CONVEYANCE CLAIM

ADLAI S. HARDIN, Jr., Bankruptcy Judge

In January 1997 defendant Federal Communications Commission ("FCC") awarded to plaintiff-debtor NextWave Personal Communications, Inc. ("Debtor" or "NPCI") 63 C block licenses for radio spectrum for personal communications service ("PCS") based on NPCI's winning bids aggregating $4.7 billion in the C block auction and reauction ending in May and July 1996. Concluding subsequently that the value of its C block licenses had been less than $1 billion in February 1997 when it executed notes to the FCC for 90% of its bid ob-

ligation, NPCI commenced this adversary proceeding in June 1998 seeking, *inter alia*, a determination that its deposits and promissory notes aggregating $4.7 billion (the "Transfers") constituted constructively fraudulently conveyances subject to avoidance under 11 U.S.C. § 544.

On the facts and the law, I conclude that the Transfers are subject to avoidance under Section 544 in the measure calculated at the foot of this decision.

JURISDICTION

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(a) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). This is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

PROCEDURAL BACKGROUND

On June 8, 1998 NPCI and certain of its affiliates filed petitions under Chapter 11 of the Bankruptcy Code, and on the same date NPCI filed this adversary proceeding. On July 13, 1998 the FCC moved simultaneously to withdraw the reference and to dismiss the adversary proceeding for lack of subject matter jurisdiction. The District Court denied the motion to withdraw the reference on November 9, 1998. This Court scheduled a hearing on the motion to dismiss and on December 7, 1998 issued a decision denying the motion with respect to the constructive fraudulent conveyance claim and granting the motion to the extent of dismissing the debtor's other claim against the FCC.

On January 26, 1999 the FCC made a motion for partial summary judgment with the object of determining whether the C block licenses should be valued as of the May and July 1996 dates of conclusion of the auction and reauction, or in January/February 1997 when

the FCC awarded the C block licenses to NPCI and NPCI issued its promissory notes for $4.2 billion. On February 16, 1999 the Court issued its decision determining that the C block licenses should be valued as of January/February 1997 when the licenses were awarded and the debtor completed the Transfers.

On March 24, 1999 the FCC filed a motion for judgment on the pleadings asserting, in substance, that the controlling Federal law does not recognize constructive fraud liability in connection with financial transactions that are open to public scrutiny. On April 2, 1999 the Court denied the FCC's motion in an oral ruling and held a final pretrial conference.

The case was tried in seven lengthy trial days commencing April 19 and concluding April 27. The adversary process and the Court benefited by exceptionally able counsel and witnesses on both sides.

FINDINGS AND CONCLUSIONS

The following are the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 made applicable in this proceeding by Bankruptcy Rule 7052.

FACTS

Allocation and Auction of Radio Spectrum

Wireless telecommunications (telephony) involve the transmission of voice and data between points using radio frequency spectrum as the transport medium. The first cellular telephone systems, developed by Bell Laboratories in the 1960s, derived their name from the small geographic areas, called "cells," into which the service region was subdivided. Each cell was supported by a single transmitter/receiver called a base station, which was connected to the public switched telephone network via a mobile services switching center using traditional lines or microwave link. Cellular systems

utilized analog technology, although cellular operators are switching to digital.

In 1981 the Federal government, through the FCC, began the process of establishing commercial wireless networks in the United States by designating two cellular licensees within each metropolitan statistical area ("MSA"). These licenses were for frequency located in assigned portions or bandwidths designated in megahertz ("MHz") of the radio spectrum. By 1989 cellular service was operational in every MSA, and the same year the FCC auctioned additional licenses for each rural statistical area ("RSA"). In the early 1990s the government decided to end the cellular duopoly controlling wireless services in the MSAs and RSAs by establishing new licenses that could be used to compete with the incumbent cellular carriers. Specifically, spectrum bandwidth was set aside for PCS.

Prior to Congress' enactment of Section 309(j) of the Federal Communications Act ("FCA"), the House Committee on Energy and Commerce (the "Committee") recognized that the radio frequency spectrum is a "precious but limited resource [that] has become vitally important to our economic success and social well being." *See* H.R.Rep.No. 103-11 at 247-48 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 574-75. Noting that the congested state of the radio frequency spectrum limited the ability to accommodate new spectrum-dependent technologies and that existing procedures for issuing radio spectrum licenses by lottery and comparative hearings had resulted in regulatory inefficiencies and permitted licensees to exploit a national resource unjustly, the Committee concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to com-

> pensate the public for the use of the public airwaves.

Id. at 580.

In Section 309(j) of the FCA Congress authorized the FCC to issue radio spectrum licenses for PCS to various categories of qualified applicants through a system of competitive bidding. 47 U.S.C. § 309(j)(1), (2). Among the categories of applicants, the FCC was directed by the statute to designate portions or "blocks" of the radio spectrum for auction to small, emerging businesses and to establish flexible, deferred license payment plans at below market interest rates to enable such enterprises to participate and compete in the communications industry. 47 U.S.C. § 309(j)(3)(B) and (4)(D).

Consistent with this Congressional mandate, the FCC divided spectrum to be used for PCS into "blocks" designated as the A/B/C/D/E/F blocks and promulgated detailed regulations for public auction of all six blocks. The regulations were adopted with the advice and counsel of knowledgeable experts in the private sector after public hearings and were well designed to ensure that all participants had access to maximum relevant information and opportunity to bid. There are four principal differences among the six blocks -- geographic area covered, amount of spectrum per license, eligibility to participate in the auction and timing of the auction.

The A and B block licenses are allocated geographically to 51 Major Trading Areas ("MTAs") throughout the United States and its territories based on the Rand-McNally Commercial Atlas & Marketing Guide (the "Guide"). The C, D, E and F block licenses are allocated geographically to 493 Basic Trading Areas ("BTAs") throughout the United States and its territories based on the Guide. Thus, every MTA incorporates within its borders a cluster of BTAs. Each MTA and BTA is covered by a single license for each block. Hence, the FCC auctioned 51 licenses in each of the A

block and B block auctions and 493 licenses in each of the C, D, E and F block auctions.

Each A and B block license is for thirty MHz of spectrum. The C block licenses also consist of thirty MHz of spectrum. Each D, E and F block license covers ten MHz of spectrum.

The C block and F block auctions were open only to entrepreneurs or small businesses including start-up companies, firms owned by minorities or women, and rural telephone companies, sometimes referred to as "Designated Entities." Consistent with the mandate of Section 309(j), recognizing that such entrepreneurial and modestly capitalized enterprises would be incapable of competing with large, established and well-financed companies either in the auction process or the marketplace, Designated Entities received material financial benefits as well as the exclusive right to bid in the C and F block auctions. Respecting the C block, "small businesses" received a 25% bidding credit and the right to pay 90% of their high bid obligation to the FCC (net of the credit) over a ten-year license period, with payment of interest only for the first six years and quarterly installment payments of interest and principal in the last four years. With respect to F block, "small businesses" received a 15% bidding credit, and "very small businesses" received a 25% bidding credit, and the right to pay 80% of their high bid obligations to the FCC (net of the credit) over a ten-year period, with payment of interest only for the first two years and quarterly installment payments of interest and principal in the last eight years. The interest rate payable by C and F block licensees was the rate on 10-year U.S. Treasury Notes at the time of the license issuance.

All of the auctions were conducted in a simultaneous, multiple round, license-by-license, open bid format. The A/B block auction was conducted simultaneously between December 5, 1994 and March 13, 1995. All of the A/B block licenses, with the exception of certain li-

censes granted pursuant to pioneer preference grants, were conditionally granted on June 23, 1995. The FCC did not conduct any other broad band PCS spectrum auction prior to the A/B block auctions. There were thirty qualified bidders in the A/B block auction. The 102 licenses issued in these auctions (51 A block; 51 B block) were awarded to bidders who paid an aggregate sum of $7.7 billion for all 102 licenses.

The first C block auction was conducted between December 19, 1995 and May 6, 1996. There were 255 qualified bidders competing for 493 licenses. The regulations prohibited any participant from being declared high bidder of more than 98 (*i.e.*, 20%) of the C block licenses. 47 C.F.R. Ch. I, § 24.710(a).[1] From July 3 to July 16, 1996 the FCC reauctioned certain C block licenses that had become available when the previous high bidders defaulted. Competition in the C block auction, particularly for licenses for BTAs having higher population densities (referred to as "Pops," or population expressed in 000's, as 2,400 Pops for 2,400,000 of population), was intense and drove prices to extraordinarily high levels in comparison to the prior A/B block auction and the subsequent D/E/F block auction. The aggregate net high bids totaled $10.071 billion in the initial C block auction and 904.6 million in the July 1996 reauction.

Although the FCC had issued a release in August 1995 stating that D/E/F block licenses would be auctioned in the last quarter of 1996, it appears that participants in the marketplace did not anticipate that the D/E/F blocks would be auctioned immediately after the C block auction and before the C block licenses had

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[1] The same limitation applied to the F block auction. The regulation prohibited indirect violation of the 20% limitation by the use of affiliates. *Id.* at § 24.710(b).

been awarded and necessary financing to "build out" the C block licenses obtained. Nevertheless, in August 1996 the FCC scheduled the D/E/F block auction, which took place from August 26, 1996 through January 14, 1997. Like the prior PCS auctions, the D/E/F block auction was conducted simultaneously in open bid, multiple round format. Fourteen hundred seventy-nine licenses were at issue in the D/E/F block auction, 493 for each block. There were 153 qualified bidders. Although the D/E/F block auction did not formally close until January 14, 1997, over 80% of the bidding was completed by October 30, 1996, and it was clear by early November that the prices paid for the D/E/F block licenses would be a fraction of those paid in the C block auction. The aggregate high bids, net of bidding credits, for the 1,493 D, E and F block licenses totaled $2.5 billion.

As a consequence of the three PCS auctions, the largest PCS licensees are Sprint PCS and AT&T Wireless PCS, with combinations of A, B, D and E block licenses covering 99% and 93% of total U.S. Pops. The third largest holder of PCS spectrum is NextWave (through its subsidiaries) with 61% of Pops covered, followed by OmniPoint PCS Entrepreneurs (36%), Western Wireless (23%) and PrimeCo PCS (23%), all holding combinations of 30 MHz and 10 MHz licenses in the C and D/E/F blocks.

In addition to the numerous categories of spectrum other than PCS utilized for wireless telephony, wireless operators employ a variety of technologies. The original analog systems have been largely replaced by digital standards, principally time division multiple access ("TDMA"), global system for mobile communications ("GSM"), frequency division multiple access ("FDMA") and code division multiple access ("CDMA"). Third generation wireless technology (3G) is the next wireless technology for future applications. AirTouch, Sprint, PCS, Bell Atlantic and PrimeCo (PCS) have all deployed CDMA, forming a nationwide footprint among

the cellular and PCS operators. NextWave utilizes CDMA technology.

Although the market for wireless communication has expanded enormously in the 1990s, so has competition and the number of wireless operators, resulting in a dramatic reduction in average revenue per user ("ARPU"). Monthly ARPU declined from $96.83 at year-end 1987 to $47.70 by the end of 1996.

The three separate auctions conducted for the A/B blocks, the C block and the D/E/F blocks produced radically different financial consequences. The six auctions involved different quanta of geography and population (MTAs for the A and B blocks; BTAs for the C, D, E and F blocks) and spectrum (30 MHz for the A, B and C blocks; 10 MHz for the D, E and F blocks). Nevertheless, prices for PCS licenses may be compared, *inter alia*, by stating the prices in terms of Price per Pop or Price per MHz-Pop. The A/B block licenses were auctioned for an average price of $0.52 per MHz-Pop (all prices here expressed net of bidding credits). For C block, the average price for the main auction ending May 6, 1996 was $1.33 per MHz-Pop, and for the July reauction the average price was $1.94 per MHz-Pop. The D/E/F block licenses were auctioned for an average price of $0.33 per MHz-Pop. NPCI bid an average of $1.53 per MHz-Pop for its 63 C block licenses.

Cellular and PCS operators are not the only ones utilizing radio spectrum for wireless telephone communications. One such system is enhanced specialized mobile radio ("ESMR"). The primary operator utilizing ESMR to construct a nationwide wireless network is Nextel Communications ("Nextel"). The FCC auctioned ESMR licenses in the 800 MHz frequencies in 1997. The FCC also auctioned licenses for wireless communications services ("WCS") in 1997, and thereafter the FCC auctioned spectrum for local multipoint distribution service ("LMDS"), which can be used for a variety of services, including wireless telephony and data.

Before turning to the particular facts in this case, it is important to highlight a distinguishing feature of the spectrum auctions. In the traditional auction the declaration of the winning bidder fixes the winner's right to and obligation to pay for the thing auctioned. There is little gap in time between the "fall of the hammer" and the exchange of payment for title to the thing auctioned. Not so in a spectrum auction. The FCC's acceptance of a high bid for a license in a particular BTA did not entitle the winner to the license, but only to the exclusive right to file a long form application seeking FCC approval for the license. Such approval was by no means assured and was subject to challenge by competing bidders or others. The approval process might take months to complete, and did in the case of the C block auction.

During the gap period between the conclusion of the C block auction and reauction in May and July 1996 and the approval of NPCI's application in January 1997 there was a profound change in the value of spectrum as perceived by participants in the PCS market and the financial community on which the participants were dependent. This change in perception of value is the genesis of this controversy.

NextWave Participation in the C/D/E/F Block Auction

NPCI is a wholly-owned subsidiary of NextWave Telecom Inc. ("NTI"), a corporation organized and existing under the laws of the State of Delaware with its principal place of business in San Diego, California, and a place of business in Hawthorne, New York. Among NTI's direct and indirect subsidiaries which filed a Chapter 11 petition on June 8, 1998 was NextWave Power Partners Inc. ("NPPI"). NTI filed for relief under Chapter 11 on December 23, 1998. NTI and its affiliates which have filed in this Court are collectively referred to as "NextWave". NextWave was organized in May 1995 to take advantage of the opportunities in the relatively young but burgeoning wireless telephony in-

dustry provided by Section 309(j) of the FCA for small businesses qualified to participate in the C and F block auctions.

C Block Auction

At the conclusion of the C block auction on May 6, 1996 the FCC announced that it had received high bids for the 493 C block licenses and designated approximately 90 high bidders. NPCI was declared the high bidder on 56 licenses. On July 3, 1996 the FCC commenced the 1996 reauction for eighteen C block licenses that became available when previously-declared high bidders failed to tender their required earnest money deposits. At the close of the reauction on July 12, NPCI was high bidder on seven additional licenses, bringing its total C block licenses to 63.

The FCC regulations required prospective bidders to deposit funds with the FCC in advance of the auctions to establish their eligibility to bid ("upfront payments"). The regulations further required winning bidders to make an additional deposit with the FCC to bring their total earnest money deposit to 5% of their total bid obligation. NPCI complied with these requirements, and as of July 23, 1996 NPCI had deposited with the FCC upfront payments and post-auction and reauction deposits aggregating $237,182,402 (the "Pre-License Payments"), representing 5% of NPCI's total bids of $4,743,648,000. NPCI duly filed long-form applications for all 63 C block licenses for which it was declared high bidder. Objections to NPCI's applications were filed by several different entities. The objections were overcome, and on January 3, 1997 the FCC announced that NPCI would receive its 63 C block licenses, conditioned on compliance with its financial obligations to the FCC.

As required, on January 9, 1997 NPCI made an additional deposit with the FCC bringing its total cash deposits to $474,364,806, or 10% of the total bid price.

On February 14, 1997 the FCC granted NPCI's licenses conditioned upon NPCI executing a series of promissory notes dated as January 3, 1997 payable to the FCC in a total face amount of $4,269,283,223 (the "Notes"). On February 19, 1997 NPCI signed the Notes and accompanying security agreements and delivered them to the FCC.

D/E/F Block Auction

NPCI's affiliate NPPI was the high bidder on 32 10 MHz licenses in the D/E/F block auction which concluded in mid-January 1997. On April 28 and June 27, 1997 the FCC announced the conditional grants to NPPI of 25 D/E/F block licenses and seven D/E/F block licenses, respectively.

NextWave's Efforts to Obtain Public Financing

Like other Designated Entities eligible for the C and F block auctions, NextWave's fledgling capitalization and lack of operating income made resort to the public capital markets essential to fund the high capital cost to build out its PCS system so as to make use of its spectrum licenses. As stated in its Registration Statement filed with the Securities and Exchange Commission (the "SEC") on February 3, 1997 (p. F-7):

> The Company is a development stage enterprise which has incurred net losses since its inception. In order to implement its business plan, significant capital will be required to (i) meet the Company's obligations to the FCC, (ii) build out the PCS network infrastructure necessary to provide service and (iii) cover its operational expenses.

NextWave anticipated that it would require approximately $700 million in public financing to implement its business plan. Half of this amount was proposed to be raised by an initial public offering of equity

securities and half by a high yield debt offering. Merrill Lynch was initially retained as lead investment banker for the equity and debt offerings. Additional underwriters for the equity offering included Lehman Brothers, Bear Stearns, Prudential Securities and ING Barings. Additional underwriters for the high yield debt offering included CIB Wood Gundy, Bear Stearns, Lehman Brothers, Prudential Securities and ING Barings. In October 1996 Smith Barney became the lead investment banker for the equity offering and CIB Wood Gundy became the lead investment banker for the debt offering, the other underwriters remaining the same.

The evidence at the trial demonstrated conclusively that, despite the best efforts of NextWave and its investment bankers, it was impossible to obtain the public financing required to build out NextWave's PCS infrastructure and implement its business plan. Although NextWave did obtain loans aggregating some $70 million from two prospective equipment suppliers pursuant to preexisting contractual arrangements, no equity or debt financing could be obtained in the public market.

NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date, nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the FCC have been placed in service.

FCC Hearings on Restructuring for C Block License Obligations[2]

The marketplace reaction to the C block debt to the FCC did not go unnoticed by the FCC. In early 1997 the FCC received several requests from C block licensees for relief from their installment payments that described a range of difficulties in accessing the capital markets. The FCC Wireless Telecommunications Bureau also received several proposals from C block licensees regarding alternative financing arrangements, as well as a petition for rulemaking regarding C block installment payments. In response to these requests, effective March 31, 1997 the FCC suspended the C block installment payments indefinitely and initiated an elaborate administrative process for restructuring C block license obligations.

On June 2, 1997 the FCC issued a public notice seeking comment on these restructuring proposals and inviting additional ones. The FCC received over 160 filings in response.

On June 30, 1997 the FCC conducted a public forum in Washington, D.C. to discuss issues regarding C block installment payments. Both before and after the public forum the FCC received numerous comments, reply comments and *ex parte* letters and presentations which provided the Agency with a wide range of restructuring proposals from C block licensees, financial institutions, investors, equipment vendors and other interested parties. The FCC established a task force to

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[2] Source: FCC Memorandum in support of its initial motion to dismiss at pp. 4-7. The Court takes judicial notice of those documents in the public record annexed to the FCC's motion to dismiss upon which the factual recitation in the FCC's Memorandum was based.

evaluate all these proposals and to recommend an appropriate course of action.

On October 16, 1997, after more than six months of effort, the FCC rendered its initial decision regarding financial relief for C block licensees and issued a Restructuring Order which provided distressed C block licensees with four distinct, mutually-exclusive options. In response to the Restructuring Order, the FCC received 37 petitions for reconsideration, seventeen oppositions to these petitions, sixteen replies and 38 *ex parte* filings. Several petitioners claimed that the options set forth in the Restructuring Order did "not provide commercially viable alternatives for financially troubled licensees" and "fell short of meaningful relief."

The FCC issued its Reconsideration Order on March 24, 1998. Upon review of the administrative record, the FCC decided that "a radical departure from the [Restructuring Order was] not warranted." Accordingly, the FCC left intact the "basic framework" of the Restructuring Order, modifying it only slightly in the Reconsideration Order "to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the down payments already on deposit, and to be more flexible in the use of those downpayments."

The 1999 Reauction of C, E and F Block Licenses

In the spring of 1999 the FCC conducted a reauction of 347 licenses from the C, E and F blocks, including 206 30 MHz C block licenses, 133 15 MHz C block licenses (the 15 MHz C block licenses presumably resulted from a licensee electing the disaggregation alternative under the FCC's Restructuring Orders), 6 10 MHz E block licenses and two 10 MHz F block licenses. The auction began on March 23 and concluded after 78 rounds of bidding on April 15, 1999. There were 76 qualified bidders.

Three hundred two licenses were bid in by 57 bidders, leaving 45 licenses unsold. The aggregate of net bids for all 302 licenses was $342,840,945, equating to a little less than $0.20 per MHz-Pop.

DISCUSSION

I. Constructive Fraudulent Conveyance Law

A. Statutory Framework

Section 544(b)(1) of the Bankruptcy Code provides:

> . . . the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b).

Section 544 incorporates the Uniform Fraudulent Transfer Act ("UFTA"), as codified by the State of California, which provides, in pertinent part:

A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

***

> (b) without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

> (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Cal. Civ. Code § 3439.04 (West 1997). The UFTA, which has been adopted by 33 states and is the successor to the Uniform Fraudulent Conveyance Act ("UFCA"), resembles the provisions of 11 U.S.C. § 548 more closely than did the UFCA. 5 *Collier on Bankruptcy* ¶ 548.01[3], p. 548-8 (15th ed. 1979).

Section 548 of the Bankruptcy Code provides:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction for which any

> property remaining with the debtor was an unreasonably small capital; or
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay such debts as such debts matured.

11 U.S.C. § 548(a).

In considering the appropriate choice of law, the fraudulent transfer provisions of California, New York[3] or the District of Columbia[4] may be applicable. The Court accepts NPCI's unopposed position that the fraudulent conveyance statutes in each of these states are, in all material respects, the same with a minor exception in the case of New York. To explain, both California and the District of Columbia have incorporated the UFTA. New York continues to apply the UFCA, which requires the exchange of "fair consideration"

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[3] New York's Debtor and Creditor Law § 273 provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

[4] District of Columbia Code (1981) § 28-3105 provides:

> (a) A transfer made, or obligation incurred, by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

rather than "reasonably equivalent value." N.Y. Debt. & Cred. Law § 273 (McKinney 1990). Fair consideration is defined in § 272 of the New York Debtor and Creditor Law to incorporate the concept of "good faith." *See In re Checkmate Stereo & Electronics, Ltd.*, 9 B.R. 585, 591 (Bankr. E.D.N.Y. 1981). Courts within this district have repeatedly held that the elements needed to prevail on a fraudulent conveyance action are essentially the same under New York's Fraudulent Conveyance Act and 11 U.S.C. § 548. *See, e.g., In re Ames Dept. Stores, Inc.*, 161 B.R. 87, 89 n.1 (Bankr. S.D.N.Y. 1993); *In re Curtina Int'l, Inc.*, 23 B.R. 969, 973-74 (Bankr. S.D.N.Y. 1982). The California, New York and District of Columbia fraudulent conveyance statutes are also in all material respects the same as the fraudulent conveyance provisions provided in 11 U.S.C. § 548. Because Section 548 of the Bankruptcy Code and the UFTA "are of common ancestry," both courts and commentators have concluded that "[c]ases under one are . . . authoritative under the other." *Interpool Ltd. v. Patterson*, 890 F. Supp. 259, 268 n.8 (S.D.N.Y. 1995); *see also, In re United Energy Corp.*, 944 F.2d 589, 593-94 (9th Cir. 1991); 5 Lawrence P. King, *Collier on Bankruptcy*, ¶ 548.01[4] (1999) ("Cases decided under the UFCA and UFTA are considered to be persuasive authority for similar issues arising under section 548 of the Code"). Accordingly, as the parties appear to concede, a choice of law analysis is unnecessary in the instant case since the fundamental legal principles would not change under any possible choice of law.

B. General Purpose

Section 544 promotes the central bankruptcy policy of equitable distribution amongst all creditors. *See In re Giordano*, 188 B.R. 84, 88 (D.R.I. 1995); *In re 375 Park Avenue Assocs., Inc.*, 182 B.R. 690, 695 (Bankr. S.D.N.Y. 1995); *In re AP Industries*, 117 B.R. 789, 800 (Bankr. S.D.N.Y. 1990) (citing *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir. 1986), *cert. de-*

nied, 479 U.S. 950, 107 S. Ct. 436, 97 L. Ed. 2d 385 (1986)). Further, Section 544 advances the goal that a debtor's prepetition transfers should not deprive creditors of property from which their claims can be satisfied. *In re Stoecker*, 131 B.R. 979, 984 (Bankr. N.D.Ill. 1991) (citing H. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 89-90 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787).

C. Elements of Recovery

As set forth above, in order to prevail on its Section 544 claim, NPCI must demonstrate that it: (1) incurred an obligation (2) at a time when it was engaged or was about to engage in a business or transaction for which the remaining assets of NPCI were unreasonably small in relation to the business or transaction, or intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due (3) for which it did not receive reasonably equivalent value.

(1) Incurrence of Obligation

Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983); *Barash v. Public Finance Corp.*, 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g.*, *In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982); *In re Smith-Douglass, Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84 (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California UFTA provides that "[a]n ob-

ligation is incurred . . . if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code § 3439.06(e)(2). A statutory provision that is clear and unequivocal on its face should be given full force and effect. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989).

Subject to section II.A., below, the issue has been addressed in the FCC's motion for partial summary judgment. In resolving that motion this Court held that the transfer of licenses for dollars and Notes occurred in the time frame January 3 to February 19, 1997. There is no dispute that the Notes were signed and delivered February 19, 1997, although dated as of January 3, 1997.

(2) Insolvency

Insolvency is a question of fact. *In re Roblin Indus., Inc.*, 78 F.3d 30, 35 (2d Cir. 1996). Under Section 3439.04 of the California Civil Code, NPCI needs only to prove that its remaining assets were unreasonably small in relation to the $4.7 billion transaction in which it was about to engage or that upon incurrence of the obligation, the debtor's debts were beyond its reasonable ability to repay. *See, e.g., Patterson v. Missler*, 238 Cal. App. 2d 759, 48 Cal. Rptr. 215, 217 (1965). A transfer may be avoided where the debtor does not receive reasonably equivalent value in exchange for a transfer and the debtor was either "insolvent at the time of the transfer or was engaged in business with unreasonably small capital." *See United Energy*, 944 F.2d at 594. As the term "unreasonably" is relative, it requires judicial consideration of the overall state of affairs surrounding the corporation and the transfer in question. *In re Suburban Motor Freight*, 124 B.R. 984, 999 (Bankr. S.D. Ohio); *Barrett v. Continental Illinois Nat. Bank & Trust*, 882 F.2d 1, 4 (1st Cir. 1989), *cert. denied*, 494 U.S. 1028, 110 S. Ct. 1476, 108 L. Ed. 2d 613 (1990). To determine the existence of "unreasonably small assets,"

courts on a case-by-case basis have used a "balance sheet approach" weighing the raw financial data of the balance sheet of the debtor against the nature of the entity and its need for capital over time. *Barrett*, 882 F.2d at 4. Another approach to the "unreasonably small assets" test is a focus on the debtor's future ability to generate cash and pay its debts as they come due. *See Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056, 1073 (3d Cir. 1992); *see also In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127, 137 (Bankr. D. Mass. 1989).

This element of a Section 544 cause of action has been resolved by the parties by stipulation. In Section V of the Joint Pretrial Order, it has been stipulated that NPCI has and had creditors holding unsecured claims allowable under Section 502 of the Bankruptcy Code which claims arose both before and after NPCI's obligation to the FCC was incurred; that when NPCI's obligation to the FCC was incurred, NPCI was engaged or was about to engage in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction; and that both NPCI and NextWave (as defined above) were insolvent on January 3 and February 14 and 19, 1997, and that NPCI was insolvent on June 8, 1998.

(3) Exchange of Reasonably Equivalent Value

The parties agree that the primary analysis of the fraudulent conveyance claim focuses upon the value of the consideration exchanged between the parties at the time of the conveyance or incurrence of debt which is challenged. *See In re Best Products Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994); *see also In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 & n.8 (5th Cir. 1993); *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). Essentially, the Court must determine whether NPCI received reasonably equivalent value by exchanging $474 million in cash and $4.27 billion in

promissory notes for 63 C block licenses. *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 993 (2d Cir. 1981); *In re Curtina Int'l, Inc.*, 23 B.R. at 974; *Whitehouse v. Six Corporation*, 40 Cal. App. 4th 527, 48 Cal. Rptr. 2d 600, 604 (1995). In other words, the analysis should be directed at what NPCI surrendered and what NPCI received. *In re United Energy Corp.*, 944 F.2d at 594-95.

Reasonable equivalency is a "measurement test," wherein "all aspects of the transaction must be examined to calculate the value of all the benefits and burdens to the debtor, direct or indirect." *In re Suburban Motor Freight*, 124 B.R. at 997; *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981); *In re Vadnais Lumber Supply, Inc.*, 100 B.R. at 136. "There is no precise formula to ascertain what constitutes reasonably equivalent value; the court as the trier of facts must determine this issue under all of the facts and circumstances of the case." *In re Curtina Int'l, Inc.*, 23 B.R. at 974; *see also Interpool Ltd. v. Patterson*, 890 F. Supp. at 268 ("the Court must consider the facts and circumstances of each case in order to determine whether reasonably equivalent value was given"); *In re Joing v. O&P Partnership*, 82 B.R. 495, 499 (D. Minn. 1988); *In re Henry-Luqueer Props, Inc.*, 145 B.R. 771, 775 (Bankr. E.D.N.Y. 1992).

It has been said that "the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *In re Fairchild Aircraft Corp.*, 6 F.3d at 1125-26. Instead, "[t]he touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991), *cert. denied*, 503 U.S. 937, 112 S. Ct. 1476, 117 L. Ed. 2d 620 (1992).

The three basic approaches to valuation are: (1) replacement cost approach, (2) the market comparison ap-

proach and (3) the income stream analysis. *See In re Executive House Associates*, 99 B.R. 266, 278 (Bankr. E.D. Pa. 1989).

Valuation was the issue tried in this case. The Court's analysis, findings and conclusion are set forth in section III, below.

II. Preliminary Issues

A. Transfer Date of Pre-License Payments

The FCC argues as a matter of law that the Pre-License Payments totaling $237,182,402[5] equating to 5% of NPCI's C block bids, which had been fully paid to the FCC by July 23, 1996, must be deemed a completed and irrevocable transfer as of that date for fraudulent conveyance purposes. The FCC asserts that "NextWave cannot seriously dispute that it received something of reasonably equivalent value in exchange for" the Pre-License Payments, which constituted a "5% opportunity cost for obtaining the 63 C block licenses for which NextWave had bid $4.74 billion."[6]

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[5] It will be recalled that the $237,182,402 was comprised of two pre-auction upfront payments totaling approximately $86 million and two post-auction cash payments totaling approximately $151,000.

[6] In its decision on the FCC's motion for partial summary judgment, this Court held that the "transfers" as there defined (*i.e.*, the 5% deposit paid in by July 23, 1996, the additional 5% deposit paid in January 1997 and the Notes) constituted transfers made or obligations incurred in the January/February 1997 time frame and were to be valued as of those dates. The FCC did not argue in the motion for partial summary judgment that the Pre-License Payments alone should be deemed completed transfers as of July 1996, and the Court did not decide the issue now presented.

In this Court's view, the issue thus raised turns on whether the Pre-License Payments were final and irrevocable by July 23, 1996. If the Pre-License Payments were not subject to repayment to NPCI irrespective of the grant or denial of the licenses in early 1997, one would have to conclude that this 5% deposit was indeed a completed transfer for fraudulent conveyance purposes. As such, it would be in the nature of an "opportunity cost" or a "ticket of admission" to the FCC approval process and its value should be judged as of the date of payment.

On the other hand, if NPCI were entitled to recover the Pre-License Payments in whole or in part depending on the award or denial of the licenses, then to that extent the transfer could not be said to take place for fraudulent conveyance purposes until the award or denial of the licenses. The answer is to be found in the FCC regulations.

Before the auction process begins, FCC regulations require upfront payments as a condition to eligibility for bidding. 47 C.F.R. §§ 1.2106(a) and (c), 24.706(a) (All auction participants are "required to submit upfront payments in accordance with § 1.2106. . ."), 24.711(a)(1). Any upfront payments must be credited toward any downpayments "required for licenses on which the bidder is the high bidder." 47 C.F.R. § 1.2106(d). If the upfront deposit exceeds "the required deposit of a winning bidder," the balance may be refunded "after determining that no bid withdrawal penalties are owed by that bidder." *Id.*

A clear distinction is made between bidders and the high bidder. Section 1.2106 requires the FCC to credit the upfront payment to the winning bidder's required deposit, subsuming it into the required deposit. The regulation is silent as to upfront payments of unsuccessful bidders, but it is uncontested that the amounts are refunded to them. Since the upfront payments must be refunded to unsuccessful bidders, they cannot be consid-

ered an irrevocable "admission ticket." This is not the case, however, for the post-auction downpayment.

Once the auction closes, the FCC must declare a high bidder. 47 C.F.R. § 1.2107(a). Upon being declared the high bidder for a particular license, the bidder must promptly deposit enough money to bring its total deposit up to the 5% level and submit its "long form" application. 47 C.F.R. §§ 1.2107(b), 24.711(a)(2). The deposit is held:

> . . . until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case *it will be returned*, less applicable payments.

47 C.F.R. § 1.2107(b), emphasis supplied. This provision makes clear that the 5% deposit, *i.e.* the Pre-License Payments, will be returned "less applicable payments," referring to the penalty provisions in Sections 1.2104(g)(2) and 24.704(a)(2).

These provisions impose penalties in the event of "default or disqualification after close of auction." The minimum possible penalty is 3% of the defaulting bidder's high bid. 47 C.F.R. §§ 1.2104(g)(2) and 24.704(a)(2).[7] One might argue that some ambiguity exists regarding the applicability of these penalties because the provisions refer only to withdrawal, default or disqualification, while other sections of the regulations refer to "License grant, denial, default and disqualifica-

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[7] The penalties under these sections might far exceed 3% of the defaulting bidder's bid, but in no event would the penalty be less than 3%.

tion," 47 C.F.R. §§ 1.2109 and 24.708, suggesting that no penalties might be mandated in the event of a "denial" of license as opposed to "disqualification." However, Section 1.2109 resolves the ambiguity is subsection (c), which states:

> A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults *or is disqualified for any reason* after having made the required downpayment, *will be deemed to have defaulted* and will be liable for the payment set forth in § 1.2104(g)(2).

Id., emphasis supplied. Thus the FCC's denial of a high bidder's license application, *for any reason*, will trigger at least the 3% penalty.

Taking these regulatory provisions as a whole, once a bidder has been declared high bidder, it must place at least the 3% of its bid at risk irrevocably. Win or lose in the approval process, the regulations provide for no set of circumstances in which this 3% minimum may be returned to the high bidder.

The FCC is therefore correct to the extent that 3% of a bidder's total bid, or three-fifths of its downpayment, was in substance and effect an "admission ticket" to the regulatory process. No guarantee that the bidder would ultimately qualify and receive a grant of license existed, but the regulations comprehend to a certainty that a high bidder will never recover at least the 3% portion of its 5% down payment whether by dint of default or disqualification.

Accordingly, $142,309,000 (the "3% Payment"), equating to 3% of NPCI's total C block bids of $4.74 billion or three-fifths of the Pre-License Payments, was irrevocably paid by NPCI to the FCC by July 23, 1996 and would not be repaid to NPCI irrespective of the outcome of the approval process. The consideration re-

ceived by NPCI in exchange for the irrevocable 3% Payment was the exclusive right to proceed with the approval process by filing a long form application for the 63 C block licenses on which it was high bidder. That consideration constituted reasonably equivalent value for the 3% Payment as a matter of fact and law.

B. Satisfaction of Antecedent Debt as Reasonably Equivalent Value

Little need be said of the FCC's argument that the debtor's $474 million of cash downpayments and $4.27 billion of Notes satisfied an "antecedent debt." The argument seems to be, in essence, that when the debtor made its required license payments by delivering the Notes, and thereby did *not* default, it "satisfied" the potential penalty obligation it might have incurred if it had defaulted. Thus, the FCC asks the Court to find that NPCI's $4.7 billion of cash transfers and Notes payable to the FCC was "reasonably equivalent" in value to the penalties for which NPCI might have been liable to the FCC if NPCI had defaulted.

The argument fails because it is based on something that did not happen. The fact is that there was no antecedent debt. No penalty was ever calculated. No penalty was ever applicable. NPCI did not default and its application was not denied. Analysis of legal rights and obligations under the Bankruptcy Code will be determined upon facts, not hypothetical default obligations never quantified or incurred.

Of course, satisfaction of a genuine antecedent debt may indeed constitute "value" for a prepetition payment or other transfer. *See*, 11 U.S.C. § 548(d)(2)(A); *In re United Energy Corp.*, 944 F.2d 589 (9th Cir. 1991). In this case, however, the "value" received by NPCI for its $4.7 billion was 63 C block licenses, not satisfaction of a fictitious antecedent debt.

III. Valuation of the C Block Licenses

A. Statement of the Issue

The parties agree on the issue that determines the outcome of the debtor's constructive fraudulent conveyance claim. As stated by NPCI:

> [T]he trial of this Adversary Proceeding requires one straight-forward determination by this Court -- what was the value of NPCI's C Block licenses in February 1997? (NPCI Trial Memorandum at 2)

As stated by the FCC:

> The only issue for this Court to resolve at trial is whether the cash transfers made, and payment obligations incurred, by plaintiff-debtor ... during the C block auction and licensing process were reasonably equivalent in value to the radio spectrum rights that NextWave acquired from [the FCC]. (FCC Trial Memorandum at 1)

The parties agree that:

> Furthermore, the proper analysis focuses solely on the value of the consideration exchanged between the parties "at the time of the conveyance or incurrence of debt which is challenged." [citations omitted] (FCC Trial Memorandum at 4; NPCI's Response at 2)

Nevertheless, highly competent experts for the parties presented radically disparate conclusions on the issue. Their divergence reflects the different methodology and different concept of "value" employed by each side. The task of the Court is to determine which approach most faithfully accords with the statute and case law.

B. Methodology

As noted above, there are three generally-accepted methods of valuing property -- (1) the replacement cost approach, (2) the market comparison approach, and (3) income stream or discounted cash flow analysis. Replacement cost measures the value of an asset by the cost to construct or replace it with another of like utility, taking into account depreciation in the asset to be valued. The market approach measures the value of an asset through analysis of recent market transactions involving comparable property. The income approach measures the value of an asset by the present value of its future earnings using discounted cash flow ("DCF") analysis. For purposes of this case, the replacement cost approach is subsumed into the market approach because the cost to replace spectrum licenses can only be determined by the cost of similar licenses auctioned by the FCC. As stated by the Bankruptcy Court in a similar litigation between a C block licensee and the FCC, *GWI PSCI Inc., et al. v. Federal Communications Commission* (*In re GWI PSCI Inc., et al.*), Adversary No.397-3492: "The market or comparable approach and the cost approach for these assets is basically the same. Comparables are based on auctions by the FCC. The only way to replace these licenses is by purchase at an FCC auction." (Transcript of April 24, 1998 at 13)

(1) Market Comparable Technique

The necessary predicates for employing the market comparable method of valuation are the existence of arm's length, marketplace transactions within a reasonably proximate time frame involving the same or basically comparable assets. The assets involved in the transactions to be compared need not be identical to the property to be valued. The test is whether the properties to be compared are sufficiently similar in nature and in-

terchangeable in function that any differences can rationally be reflected by appropriate adjustments.[8]

NPCI's expert, Anthony P. Kern, employed the market comparable approach to value the C block licenses. Mr. Kern issued two reports, one valuing the assets as of January 13, 1997, the date the FCC announced the award of C block licenses to NPCI, the other valuing as of February 19, the date on which NPCI complied with its purchase price obligations by executing the Notes and delivering them to the FCC. Mr. Kern also issued a supplementary report (collectively with the January 13 and February 19 reports, the "Kern Report") correcting a calculation omission. It is NPCI's legal position that February 19 is the proper valuation date, although Mr. Kern's valuation for February 19 is higher than that for January 13.

Mr. Kern examined for potential comparability the A and B block licenses auctioned in early 1995, the D/E/F block licenses auctioned during the last quarter of 1996 and a number of PCS license transactions subsequent to these auctions. For reasons articulated in his report, Mr. Kern rejected the A/B block auctions and the subsequent PCS license transactions as comparables.

Mr. Kern selected the D, E and F block auction prices as appropriate comparables for his analysis. After applying adjustments which he deemed appropriate to account for material differences between the C block licenses, on the one hand, and the D, E and F block li-

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[8] For example, virtually every parcel of real estate differs from other parcels in some respects and, indeed, real property is frequently characterized as "unique" on a piece-by-piece basis. Yet the market comparable technique is traditionally accepted as the proper method of valuing real estate in most cases, using adjustments to reconcile differences between specific parcels.

censes on the other, Mr. Kern arrived at a reconciled fair market value per Pop for the C block licenses of $7.82, equating to a fair market value for NPCI's C block licenses of $810,358,264, rounded to $810.4 million.

(2) Discounted Cash Flow Analysis

Discounted cash flow analysis is a long-recognized and widely-used method of predicting or projecting value. If neither replacement cost nor comparative market can be utilized, DCF analysis may be the only practical way to evaluate property.

As employed by investment bankers and economists, DCF analysis entails the creation of a computer model incorporating on a line-by-line basis assumptions and projections of the myriad components of the overall market, market penetration and sales, revenues, costs, and the asset base and capitalization which support them, projected out over all relevant market conditions expected to prevail in a finite time period, in this case ten years. DCF analysis is widely if not universally used in the business and financial world as a tool to assist management in making decisions whether to invest in or dispose of businesses or major assets. It is generally not used as a tool for determining fair market value, particularly when that determination can be made using either replacement cost or market comparables. DCF analysis is obviously more reliable if the assumptions and line item components are based on actual, historical performance figures or contractual rights and obligations.

The FCC's expert, Dr. David J. Salant, prepared and relied upon a DCF model as the basis for his conclusion of value in his report (the "Salant Report"). Dr. Salant's valuation of NPCI C block licenses using a DCF model is presented in Part IV at pages 42-47 of the Salant Report, and the "Details on the Discounted Cash Flow Valuation of NextWave's C Block Licenses" is to be found in Exhibit F to the Report. The entire remainder

of the Salant Report and Exhibits is devoted to rebuttal addressed to the Kern Report. As stated by Dr. Salant:

> A good DCF model requires the analyst to think through, document and quantify each and every revenue, cost, multiple and discount rate. While the DCF approach may require the analyst to make "hundreds of assumptions," the discipline of the DCF approach in the hands of a knowledgeable practitioner means that those assumptions are logically consistent and reasonable. Indeed, one of the major advantages of the DCF approach is that another analyst can explicitly test the sensitivities of his or her result to changes in the assumptions. (Salant Report 43)

Dr. Salant continued:

> Any DCF analysis is subject to second-guessing because of the assumptions needed to complete the calculations. This DCF analysis has two main purposes: (1) to derive license values from a consistent and conservative set of assumptions based on our considerable experience in valuing PCS and cellular licenses, and (2) to compute a confidence interval, consisting of an extremely cautious lower bound and a moderately optimistic upper bound about how much a reasonable bidder/license buyer might be willing to pay for the licenses that NextWave won. The end result of our DCF analysis is a tool that allows us to perform a carefully considered estimate of the value of the licenses.

> We use the DCF to compute the maximum amount a very prudent firm would be willing to pay for the licenses. . . .
>
> No DCF analysis is perfect, and one can always debate the underlying assumptions. . . . Besides our own experience, our analysis uses industry sources and NextWave documents to form projections of key variables such as penetration and average revenue per user. (Salant Report 44-45)

Under the heading "Summary Description of the DCF Model," Dr. Salant stated:

> The DCF model calculates revenues based upon information about wireless market penetration, PCS market penetration, minutes of use, retail revenue per user and wholesale revenue per user. Capital expenditures include cell site build-out and switching costs. Operating expenses include network related, marketing and billing expenses. For the base case we apply a 16% cost of capital, which is consistent with that used by NextWave in many of their DCF runs. (Salant Report 45)

In preparing his DCF analysis, Dr. Salant did not undertake to prepare and document the "hundreds of assumptions" customarily required for a DCF analysis in the business and financial world. Exhibit F to the Salant Report, entitled "Details on the Discounted Cash Flow Valuation" consists of a bar chart backed up by three sheets. The first sheet entitled "Free Cash Flow" contains the following line items: EBITDA, Taxes, FCC License Payment, Capital Expenditures, Change in Working Capital, and a resulting bottom line entitled Unlevered Free Cash Flow. The second sheet entitled "Equipment Costs" contains two categories, Non Recur-

ring Costs (BTS Cost, Carrier Cost, Switch Cost and Switch Capacity Per Subscriber) and monthly Recurring Costs (BTS Site Cost, Carrier Cost, Switching Cost). The third sheet entitled "Key Baseline Values" contains eleven line items (Total Population, Covered Pops, PCS Company Subscribers, Basic Minutes Per User, PCS Average Revenue Per User, Data Service Percentage of PCS Service Revenue, Capital Expenditures per Pop, Operating Expense per Pop, # BTS, # Carriers and # BSCs), and sets forth three additional assumptions, Number of Competitors at 6, Cost of Capital at 16% and Terminal Value Multiplier at 9. All line item projections on all three sheets are extended ten years from 1997 through 2006.

Once the DCF model has been created, its production of a number for value is a mathematical computation by the computer. The computation obviously will change to reflect any change in the assumptions in the model.

Dr. Salant's DCF model produced a "retail base case" value of approximately $2.5 billion as reflected on the bar chart in Exhibit F to his Report. Dr. Salant reasoned, however, that NextWave's strategy was to become a "carrier's carrier" and to market its PCS services to other providers, such as OmniPoint (with which NextWave had a marketing contract), which would in turn sell to the retail market. To reflect the value of this strategy inherent in NextWave's C block licenses Dr. Salant calculated the "wholesale base case" in the second column of the bar chart by simply eliminating from the model all costs associated with the retail part of the business. The DCF model then calculated a wholesale base case value at $31.46 per Pop, equating to approximately $3.3 billion as the value of the 110 Pops covered by NPCI's 63 C block licenses. The remaining four bars on the chart escalating to just over $8 billion showed calculations produced by the model using four modified assumptions (*viz.*, reduced build-out costs, five wireless

competitors instead of six, increased data revenues, lower cost of capital).

(3) The Meaning of Value

The parties' experts differed profoundly not only on their conclusions as to value but on the very meaning of the "value" which each sought to quantify.

Mr. Kern sought to determine "fair market value," which he defined as "the amount at which the subject assets would change hands between a willing buyer and willing seller, in an arm's length transaction, in which both buyer and seller have reasonable knowledge of the relevant facts, and neither is under compulsion to complete the transaction." (Kern Report 1, 42) Central to Mr. Kern's conclusion is the premise that the spectrum auctions conducted by the FCC met the criteria embodied in the quoted definition of fair market value and that the prices bid at those auctions constituted the fair market values of the licenses sold as of the respective dates of the auctions. Thus, it was Mr. Kern's view that the D/E/F block auction which concluded in mid-January 1997 established the fair market value of those licenses at that time.[9] On the further premise that the C block licenses were functionally the same assets as the D/E/F block licenses, assuming various adjustments to account for differences between the various licenses, Mr. Kern concluded that the value per Pop of the C block licenses was equal to the price per Pop of the D/E/F block licenses after adjusting that price to reflect the differences between those licenses and the C block licenses.

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[9] Consistent with this premise, the debtor concedes that the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and the reauction in May and July 1996, as of those dates.

By contrast, Dr. Salant does not recognize the concept of fair market value as defined by Mr. Kern, and he testified that "fair market value" is not a term used by economists such as he. Price, whether established in a public auction or in a private, arm's length negotiation, is not the same as value, as Dr. Salant conceives of value. "[I]t is well-established that auction prices, especially in complex procedures, can and do depart from any notion of 'value.'" (Salant Report 5) Dr. Salant describes what he perceives as "the fundamental difference between *value* and *price*" (*id.* at 7, emphasis in original). Dr. Salant states: "We use the DCF to compute the maximum amount a very prudent firm *would be willing to pay* for the licenses" (*id.* at 44, emphasis supplied), and in his testimony Dr. Salant repeatedly described "value" as a measure of "willingness to pay." Explaining the difference between value and price in the context of an auction, Dr. Salant observed that frequently the winning bidder will pay far less than the bidder's true valuation of the asset depending upon the level of competition presented by competing bidders. Indeed, it would appear that a buyer would never intelligently pay the full "value" which he ascribed to property in his DCF model, since one would never pay now the full value which the model would predict could only be earned over a span of years if all of the assumptions built into the model proved to be correct. Thus, the "value" produced by a DCF model is what a prudent buyer ought to be willing to pay for an asset based upon the assumptions embodied in the model, without regard to actual prices in the marketplace for similar property.

C. Conclusions on Methodology

The FCC's expert witnesses challenged the market comparable analysis relied upon by the debtor on two basic grounds, one focusing on the perceived non-comparability of the *auctions* and the other on alleged non-comparability of the *licenses*.

First, the FCC argued that the C block auction represented a different business opportunity than the D/E/F block auction and, consequently, that the C block auction attracted far more competition and hence generated higher prices. The theory of the FCC experts was that the C block auction was the last opportunity for an operator to establish a "national footprint" with 30 MHz of spectrum to compete with the major players such as AT&T, Sprint and Nextel, and that the D/E/F block auction was intended merely as a means for "incumbents" to "fill in the gaps" in their 30 MHz systems.

One might debate this theory[10] if it were relevant, but it is not. There is no dispute that the C block auction, in which 255 qualified bidders competed for 493 BTA licenses, was far more competitive than the D/E/F block auction, in which 153 qualified bidders competed for 1,479 BTA licenses, and that the prices bid for the C block licenses were exponentially higher than the prices

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[10] Although the C block auction obviously did present a "different business opportunity" from the D/E/F block auction, it is questionable whether either the experts who devised the PCS auction process or the participants viewed the C block auction as an opportunity for the development of a truly national footprint to compete with the nationwide coverage of the major wireless operators such as AT&T, Sprint and Nextel. The C block auction was open only to entrepreneurial, small businesses and rural telephone companies with very limited capital resources. Moreover, the FCC regulations precluded any C block bidder from acquiring more than 98 licenses, 20% of the 493 licenses auctioned, thus precluding the acquisition of a truly national footprint. The most successful C block bidder, NPCI, acquired only 56 licenses in the initial auction and an additional seven licenses in the reauction. By contrast, AT&T, Sprint and Nextel all covered virtually the entire nation through a combination of cellular, PCS, ESMR and other spectrum.

bid for the D/E/F block licenses on a comparative MHz-Pop basis. The difference in the nature and competitiveness of the two auctions may explain *why* the C block bid prices were higher than the D/E/F block prices,[11] but *why* is not the issue. The issue before the Court is whether the C block licenses were sufficiently comparable to the D/E/F block licenses that the prices bid in the D/E/F block auction reflected a revaluation of the C block licenses as perceived in the marketplace.

On this issue it was Dr. Salant's view that the C block prices might have been just as high if that auction had been held in early 1997. He stated:

> Indeed, there is little reason to believe that had the C block auction been run, say over two or three months ending in January or February of 1997, with the same sets of bidders and the same initial eligibilities,

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[11] Many reasons for the radical decline in the perceived value of PCS spectrum were suggested at trial, including the difference in business opportunity emphasized by the FCC experts, the proposition that the C block bidders simply misjudged the market and grossly overbid in a frenzy of speculation, the sharp decline in the stock market prices of other companies in the wireless telecommunications business during the latter half of 1996 (the stock of OmniPoint, described by a witness as the "poster child" of public wireless operators, lost three-quarters of its value from May 1996 to April 1997) and the widespread concern or belief that the FCC had determined to remove the scarcity factor from the value of PCS and other wireless spectrum by flooding the market with spectrum through the D/E/F block auction and the auctions in 1997 for ESMR, WCS and LMDS spectrum, all of which were announced in the latter half of 1996. Undoubtedly all of these factors contributed to the decline in the perceived value of spectrum for wireless telecommunications.

> that prices would have been much different. (Salant Report 30)

The evidence refuted that supposition. Of course, there was no auction for C block licenses in early 1997, but there was a market to test the value of those licenses -- the market for public financing. If the market had indeed perceived the value of the C block licenses in January/February 1997 to be what the auction winners bid in May and July 1996, there is no reason to doubt that NextWave and the other C block licensees would have succeeded in raising the $1.6 billion of debt and equity they needed in the public market. The trial testimony on this issue of the NextWave representatives and their independent investment bankers was entirely credible. That evidence demonstrated that by January 1997 the market did not believe in the values bid in the C block auction. In meetings with the investment banking community, these witnesses found that the primary obstacle to funding NextWave's capital requirements was the perception based on the D/E/F block auction that the cost of the C block licenses was grossly excessive and that NextWave could not compete with that cost structure and debt burden. Despite the best efforts of these witnesses and others to convince the financial markets that C block licenses were different from and far more valuable than D, E and F block licenses (using many of the same arguments advanced by the FCC at trial), they failed to do so, and no C block licensee could obtain any public funding.

Thus, lack of comparability of the two auctions may explain why the C block bid prices were higher than the D/E/F block prices, but it does not answer the question whether the D/E/F block auction and other factors such as mentioned in footnote 11 undermined the market value of the C block licenses. The fact is that the market's perception of the value of PCS licenses had changed by 1997. The FCC's 1999 reauction of C, E and F block licenses (predominantly C block licenses)

demonstrated that the market value of this spectrum has declined even further.

The FCC challenged the comparability of the C block licenses and the D/E/F block licenses in only one respect -- capacity. The FCC's experts presented a plethora of data designed to show the differences in capacity of a 30 MHz C block license and a 10 MHz D/E/F block license. They demonstrated that 10 MHz of spectrum is divisible into three usable channels, while 30 MHz can support eleven channels. With the sustained and rapid growth in mobile telephone ownership and usage and the likely advent in the coming years of "local loop service" and wireless data transmission,[12] capacity provided by 10 MHz will become insufficient to service demand. The debtor's witnesses countered by pointing to the sufficiency of 10 MHz for operations in even the most populous markets even today, more than two years after the February 1997 valuation date, and the virtual certainty that a continuation of market adjustments[13] and technological improvements and inno-

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12 "Local loop service" refers to customer usage of wireless mobile telephones in virtual replacement of traditional stationary telephones in the home and office. The experts do not anticipate that local loop wireless service will supplant traditional fixed point telephones unless and until monthly rates for wireless usage are brought down to levels competitive with high volume usage (say, 1,000 minutes or more per month) on fixed point telephones. With existing technology, wireless transmission of data uses a great deal of spectrum capacity. But, there is little demand for wireless transmission of data today, and the evidence at trial would not support any finding as to the likelihood of a material increase in demand for wireless data transmission within the next five years.

13 Since capacity planning must be geared to maximum demand on a telephone system, the quantification of peak demand is an essential factor in capacity. The FCC's experts

[Footnote continued on next page]

vations[14] to increase 10 MHz capacity, known to the market in late 1996 and early 1997, will substantially accommodate all but the most radical increases in demand that might be expected six, seven or eight years in the future. Any capital costs to be incurred five or more years in the future to implement technological innovations to increase 10 MHz capacity must be weighed against the immediate and ongoing capital cost of carrying, or "warehousing," 30 MHz of capacity more than two-thirds of which is not needed now and which may become technologically obsolete before it is ever put to use.

Considering all of the evidence, I conclude as a matter of fact and law that the C block licenses were substantially comparable to the D/E/F block licenses in February 1997 for purposes of determining the value of the former based upon the auction prices of the latter. The D/E/F block auction determined the fair market value of

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quantified peak demand at 12-1/2% in calculating when 10 MHz capacity might be exhausted in the future. The debtor's witnesses countered by pointing out that the 12-1/2% figure was predicated on historic mobile telephone usage during commuting hours, primarily at the end of the day, when most mobile phones were car phones. The advent of small, highly portable mobile phones has not only increased overall wireless telephone usage, it has also spread that usage over the entire day and weekends, thereby decreasing the peak demand factor to 8-1/2% despite the increase in overall wireless usage.

[14] Such technological improvements include the greater efficiencies resulting from the various digital technologies (the most efficient of which appears to be CDMA), which may be replaced by even greater efficiency of 3G technology; utilization of eight kilobit EVRC vocoders in place of 13K vocoders; utilization of six sector in place of three sector antennae.

those licenses as of the time of the auction. The D/E/F block auction concluded precisely at that point in time when the C block licenses are to be valued. The C block licenses are functionally identical to and interchangeable with the D/E/F block licenses in every respect, save only capacity. All 493 licenses in each of the C, D, E and F blocks covered precisely the same geography and population in the same BTAs. With respect to capacity, the undisputed evidence showed that even at the time of trial in April 1999 no PCS operator is using more than 10 MHz of spectrum in even the most densely populated BTA; indeed, no PCS operator is using more than two of the three channels available in 10 MHz in any BTA. Knowledgeable participants in the PCS market and their financiers knew in February 1997 that demand might exceed 10 MHz capacity in the most populous BTAs at some point in the perhaps distant (five years or more) future, and they also knew that technology existed even then which might expand 10 MHz capacity to meet any reasonably projected demand. These findings do not mean that there was no difference between 10 MHz and 30 MHz of spectrum; they do mean that the C block licenses and the D/E/F block licenses were comparable for market valuation purposes, subject to appropriate adjustment for the capacity difference between 30 MHz and 10 MHz which might or might not become material at some point in the future depending upon market conditions, which might increase demand beyond 10 MHz capacity, and technological advances, which might expand 10 MHz capacity to meet demand.

Accordingly, I conclude that Mr. Kern's market comparable analysis is an appropriate method of determining the value of C block licenses in February 1997, subject to appropriate adjustments, discussed below.

The market comparable method of valuation satisfies two key legal requirements. First, valuation by reference to actual market prices in a public auction open to every potential purchaser in the marketplace and con-

ducted under FCC regulations designed to provide every bidder with maximum possible competitive information establishes "fair market value" of the property auctioned as a matter of law. *Keener v. Exxon Co., USA*, 32 F.3d 127, 132 (4th Cir. 1994), *cert. denied*, 513 U.S. 1154, 115 S. Ct. 1108, 130 L. Ed. 2d 1074 (1995) (bid price equated to fair market value). The *Keener* court explained:

> [F]air market value is, by necessity, best set by the market itself. An actual price, agreed to by a willing buyer and willing seller, is the most accurate gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative.

Id. (citing *Amerada Hess Corp. v. Commissioner of Internal Revenue*, 517 F.2d 75, 83 (3d Cir. 1975). "[W]hen a third party makes an offer in cash, or its equivalent, for an item, a 'court can justifiably infer that the amount of an arms' length offer represents the value of the [asset]." *Id.* at 132 n.5 (citing *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992)). Fair market value is the price which a willing buyer would pay a willing seller in an arm's length transaction, where both the buyer and seller have reasonable knowledge of the relevant facts and neither is under compulsion to complete the transaction. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 548, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994); *In re Grigonis*, 208 B.R. 950, 955 (Bankr. D. Mont. 1997). *See also*, *In re Prince Gardner, Inc.*, 220 B.R. 63, 66 (Bankr. E.D. Mo. 1998) (citing *BFP*, 511 U.S. at 548 ("in the vast majority of asset transfers other than real estate foreclosure sales, the Bankruptcy Courts can determine worth and reasonably equivalent value by referring to the common-law notion of fair market value")); *see also Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997); *In re R.M.L. (Mellon Bank v. The Official Committee of Unsecured*

Creditors), 92 F.3d 139, 149 (3d Cir. 1996); *In re Ozark Restaurant Equipment Co., Inc.*, 850 F.2d 342, 345 (8th Cir. 1988); *In re Colonial Realty*, 226 B.R. 513, 523 (Bankr. D. Conn. 1998); *In re O'Neill*, 204 B.R. 881, 887 (Bankr. E.D. Pa. 1997) (reasonably equivalent value means fair market value outside foreclosure context); *In re Grigonis*, 208 B.R. at 955. Fair market value, as defined by Mr. Kern in his Report and as established in the D/E/F block auction, is the legal standard for determining value in a proceeding to determine whether there has been a constructive fraudulent conveyance. *Morris Communications*, 914 F.2d at 469 (quoting *United States v.100 Acres*, 468 F.2d 1261, 1265 (9th Cir. 1972)) ("The method of 'comparable sales' in the relevant time frame is 'more appropriate than any other method in determining market value of the property.'"); *El Paso Natural Gas Co. v. Federal Energy Regulatory Comm'n*, 96 F.3d 1460, 1464 (D.C. Cir. 1996) ("evidence of contemporaneous sales of comparable properties is generally the preferred method of valuation"); *In re Martin-Trigona*, 760 F.2d 1334, 1345 (2d Cir. 1985); *Cowen v. Guidry*, 274 F. Supp. 22, 24 (E.D. La. 1967) (there is no justification for using income approach to fair market value where comparable sales are available); *In re General Industries, Inc.*, 79 B.R. 124, 128 (Bankr. D. Mass. 1987) (under the circumstances at issue the court found the "market data method is the most practical method approach to valuation"); *In re Thompson*, 18 B.R. 67, 70 (Bankr. E.D. Tenn. 1982) ("It is generally recognized that comparable sales in the vicinity of the subject property produce the best guides to determine fair market value").

Second, the market comparable method comports with the requirement that value be determined in bankruptcy proceedings by an objective standard. *In re Independent Clearing House Company*, 77 B.R. 843, 859 (D. Utah 1987); *In re Taubman*, 160 B.R. 964, 986 (Bankr. S.D. Ohio 1993); *In re Morton Shoe Companies, Inc.*, 24 B.R. 1003, 1009 (Bankr. D. Mass. 1982); *In re*

Richardson, 23 B.R. 434, 444 (Bankr. D. Utah 1982); *In re Checkmate Stereo and Electronics, Ltd.*, 9 B.R. 585, 591 (Bankr. E.D.N.Y. 1981), *aff'd*, 21 B.R. 402 (E.D.N.Y. 1982).

The same conclusions cannot be reached with respect to the DCF method of valuation relied upon the FCC. The DCF method suffers from four fundamental defects for purposes of valuing the C block licenses in this proceeding.

First, the income method of analysis values an enterprise as a totality; it does not value any particular element of property within the enterprise. A PCS license by itself cannot generate any income. Only an enterprise can generate income, and the enterprise consists of congeries of assets, management, a business plan, production and service employees and financing, and the enterprise exists in the context of a marketplace consisting of customers, competitors and regulators. Every element just mentioned has associated with it a number for every point in time, and all of those numbers must be included in the DCF model to calculate a value. The value so determined is the value of the enterprise, not any particular asset within it.

Second, in a case such as this the constituent elements incorporated in a DCF model for the mathematical calculation of value are not objectively ascertainable facts in the real world, as are comparable sales and market prices. Every single line item in Dr. Salant's DCF model is an assumption utilized to calculate a projection, from which is mathematically extrapolated a net present value. The gap in reliability between objectively verifiable facts used in the market comparable methodology and the assumptions used in this kind of DCF analysis is compounded in the case of a start-up enterprise such as NextWave, where there is no record of historical performance on which to base assumptions for future projections. *See, Langham, Langston & Burnett v. Blanchard*, 246 F.2d 529, 532 (5th Cir. 1957) (valuation of a

company as a going concern is inappropriate when the business is wholly inoperative or on its deathbed); *In re Fred D. Jones Co.*, 268 F. 818 (7th Cir. 1920), *cert. dismissed, Heldman v. Central Trust Co. of Illinois*, 257 U.S. 664, 42 S. Ct. 45, 66 L. Ed. 424 (1921); *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 341 (E.D. Pa. 1988) (to treat a wholly inoperative or defunct company "as a going concern would be misleading and would, in fact, fictionalize the company's true financial condition"); *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 387 (Bankr. D. Minn. 1985). The problem is exacerbated with the DCF analysis relied upon by the FCC in this case. The textual description of Dr. Salant's DCF model at pages 42-46 of the Salant Report and in the three remarkably spare spreadsheets comprising Exhibit F to that Report are by no means self-explanatory, intuitively comprehensible or objectively verifiable by the trier of fact. We know only that the DCF model was created by Dr. Salant and his assistants and, as to the sources of their assumptions, the statement: "Besides our own experience, our analysis used industry sources and NextWave documents to form projections of key variables such as penetration and average revenue per user." (Salant Report 44-45)[15]

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[15] The reason for concern as to the reliability of a valuation predicated entirely on unverifiable, subjective assumptions is readily illustrated. For example, a variation of 1% in the presumed weighted average cost of capital (WACC) results in a $500 million change in the value calculated by Dr. Salant's DCF model. Changing the assumption of wireless competitors from six to five increases Dr. Salant's calculation of value by $1.5 billion. The modification of the "retail base case" value of $2.5 billion to produce the "wholesale base case" of $3.3 billion (relied upon by the FCC as the value of NPCI's 63 C block licenses) by the simple expedient of deleting from the model all costs associated with retail appears

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Third, whatever uncertainties one may have with regard to the assumptions built into the DCF model by Dr. Salant and his associates, there can be no uncertainty that one key assumption of the model conflicted with reality. The model assumed the existence of financing to build out the necessary infrastructure to conduct a PCS wireless business using C block licenses. In the real world, however, not a single C block licensee was able to obtain financing to build out its system, precisely because of the financial community's concern as to the value of the C block licenses. This single fact undermines the utility of the model. It is not an answer to say that the model is designed to demonstrate a hypothetical value, because the law requires a determination of fair market value, not hypothetical value.

Finally, as acknowledged by Dr. Salant his DCF methodology is not designed to produce a calculation of "fair market value" as defined by appraisers and the courts. Dr. Salant disclaimed fair market value as a concept employed by economists and as an objective of DCF analysis. Dr. Salant's concept of value is something quite independent of the price which a fully informed seller and buyer would accept and pay in an arm's length, unconstrained transaction. DCF analysis is undoubtedly an essential tool for economists and financial analysts to assess risk in a proposed transaction or strategy by calculating the differences in value produced by manipulating the assumptions built into the model. But such "values" are hypothetical and cannot be used to supplant the market comparable method to determine current "fair market value" in circumstances, such as presented here, where market value can be determined by reference to the prices paid in actual, con-

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to implicate the anomalous result of a negative value of $800,000 associated with the retail side of the business.

temporaneous transactions involving comparable properties.[16]

For the foregoing reasons, I must reject the DCF methodology relied upon by the FCC.[17]

D. Conclusions on Value

This Court's decision on the FCC motion for partial summary judgment left open the question whether the C block licenses should be valued with an effective date as of January 3, 1997, the date on which the FCC issued its ruling conditionally awarding the C block licenses to NPCI, or February 19, 1997, the date on which NPCI executed and delivered the Notes to the FCC. I conclude as a matter of law that February 19 is the appropriate date for valuation, because it was not until NPCI complied with its purchase price obligation by delivering the Notes that the transfer occurred and the obligation was incurred.

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[16] In other circumstances the income method of valuation may be preferred, such as where there are no truly comparable transactions and income is objectively verifiable as a basis to determine present value based on highly reliable projection of future net income.

[17] Mr. Kern's reasons for rejecting the income approach to valuation were concisely stated in his Report at page 43.

> The income approach was considered but not utilized because of the uncertainty in projecting typical build-out costs, subscriber growth, operational expenses, changes in ARPU [average revenue per user], effects of competing technologies and numerous other factors necessary for a start-up company in a developing industry. Additionally, the income approach assumes a fully-financed company holding the licenses and an operating network generating cashflow.

As noted above, the Kern Report valued NPCI's 63 C block licenses at $810,400,000 based on the prices bid at the D/E/F block auction after giving effect to certain adjustments to the latter prices to reflect differences between the respective licenses. The FCC experts took exception to these adjustments in several respects, each of which will be considered.

Competition Adjustment. The FCC argued that there should be a "competition" adjustment because of the fact that the C block auction was more competitive than the D/E/F block auction (far more bidders, having submitted far higher upfront payments, competing for one-third the number of licenses). The argument must be rejected for two reasons. First, as explained above the market comparable approach looks not to the comparability of sales events but to the comparability of the things being sold. Thus, there is no need to make adjustment to reflect differences between the auctions. Second, it is self-evident that the difference in competitiveness between the two auctions is fully reflected in the differences in the prices bid—indeed, the bid differential is precisely the consequence of the greater competitiveness of the C block auction.

30 MHz/10 MHz Multiple. Although 10 MHz provides sufficient capacity presently and, in many or most BTAs, for the indefinite future, there is little doubt that 30 MHz capacity may have significant economic value in years to come in high population BTAs, for which NPCI holds eleven C block licenses. This would suggest an adjustment of 3 to 1 for the eleven high Pop licenses and no adjustment (*i.e.*, a 1 to 1 ratio) for the 52 licenses where 30 MHz appears unlikely to add value to a 10 MHz license. Technological arguments exist which may justify a higher than 3 to 1 ratio (*e.g.*, eleven channels for 30 MHz versus three channels for 10 MHz suggests a 3.67 to 1 ratio; "trunking factor" suggests a 4.5 to 1 ratio). However, applying even a 4.5 to 1 ratio to the eleven high Pop licenses and a 1 to 1 ratio for the re-

maining 52 licenses produces a total value for all 63 licenses materially lower than $810.4 million. Considering all the factors bearing on the issue, I conclude that there is no basis to select an adjustment different from the 3 to 1 ratio which Mr. Kern applied to all 63 licenses.

Cost of Capital. C block licensees enjoyed significant advantages in respect of financing their purchase price obligations to the FCC, described above. F block licensees enjoyed different financing advantages, also described above, and D and E block licensees were required to pay the FCC in full in cash for their licenses. To adjust for the financing differentials Mr. Kern used an interest rate of 11.75% being the median value of 1996 debt offerings of seven other PCS and cellular operators. However, all seven of the issuers, including Sprint and Western Wireless Corp., were relatively well-established, operating companies. Weighing the conflicting testimony of the experts and other evidence, I conclude that 11.75% represented an overly optimistic cost of money for a development stage company such as NextWave in February 1997, and that 14% is a more reasonable adjustment to reflect the financing advantages of the C block licenses compared with the D, E and F block licenses.

Percentage of Favorable Financing Adjustment. Although he concluded that an adjustment was necessary to reflect the favorable financing available to C block licensees, Mr. Kern applied only 60% of that adjustment, rather than 100% necessary to realize full equalization, reasoning that a purchaser of C block licenses in February 1997 probably would not be willing to pay an amount sufficient to reflect 100% of the financing differential. I agree with the FCC experts that the financing adjustment should be taken at 100% in order to fully reflect the value of the C block licenses where that value is to be derived from a comparison with the D, E and F block licenses.

Summary. Near the conclusion of the trial at the Court's request Mr. Kern recalculated the value of the 63 NPCI C block licenses in accordance with his market comparable methodology but utilizing a variety of different assumptions on the disputed adjustments, discussed above (*see* Plaintiff's Trial Exhibits 136, 143). Using February 19 as the effective date for valuation and applying the Court's conclusions with respect to the adjustments discussed immediately above (*i.e.*, a 3 to 1 ratio to reflect the MHz differential, a 14% cost of capital and 100% of the favorable financing differential) results in a calculation of $908,146,000 (*see* Exhibit 136 sheet 6, Exhibit 143 sheet 4). Accordingly, it is this Court's ruling that $908,146,000 was the fair market value of NPCI's 63 C block licenses as of February 19, 1997. By any standard this did not constitute reasonably equivalent value for $4.6 billion of Transfers.

Under this ruling the $908,146,000 figure represents the fair market value of 100% of the debtor's C block licenses. As such, it does not take account of the Court's ruling under section II.A., above, that the 3% Payment of $142,309,000 constituted a fair exchange of value not subject to avoidance under Section 544. It is necessary to give effect to both rulings in calculating the total amount of NPCI's $4.7 billion of Transfers that is subject to avoidance under the statute. To this end it is appropriate to take 97% of the $908,146,000 figure, or $880,902,000, and add back the 3% Payment of $142,309,000. The sum, $1,023,211,000, may be said to constitute the fair market value of the entire consideration received by NPCI in exchange for the entire $4.7 billion of Transfers, for purposes of fraudulent conveyance analysis. The result of subtracting $1,023,211,000 from the $4,743,648,000 of total Transfers is $3,720,437,000, representing that portion of the total Transfers subject to avoidance under 11 U.S.C. §§ 544, 548 and 550.

The Court will conduct a further hearing to consider the question of remedy at the parties' earliest convenience.

In re NextWAVE PERSONAL COMMUNICATIONS INC., et al., Debtors.

NextWave Personal Communications, Inc., Plaintiff,

v.

Federal Communications Commission,

Defendant.

Bankruptcy No. 98 B 21529 (ASH), Adversary No. 98-5178A

United States Bankruptcy Court,

S.D. New York.

235 B.R. 305

June 22, 1999

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DECISION ON REMEDY

ADLAI S. HARDIN, Jr., Bankruptcy Judge

On May 12, 1999 this Court issued its decision (the "May 12 Decision") after trial on the merits of the constructive fraudulent conveyance claim asserted by plaintiff-debtor NextWave Personal Communications, Inc. ("NPCI") against defendant Federal Communications Commission ("FCC"). The Court left open the question of remedy and sought further illumination of the parties' positions in light of the ruling on the merits.

To avoid unnecessary repetition, this Decision on Remedy shall be deemed a supplement to and a part of the May 12 Decision. Having ruled on the issue at the May 26 hearing on remedy and signed an order and judgment granting the remedy sought by NPCI, the purpose of this Decision is to set forth the grounds for the ruling.

POSITIONS OF THE PARTIES

NPCI

NPCI's position is based upon the words of the statute. Section 544 of the Bankruptcy Code, upon which the claim is based, states that "[t]he trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law. . . ." NPCI points out that, unlike other provisions of the Bankruptcy Code (*e.g.*, Sections 106(a)(2), (3), 305(a), 1109(b)), which provide that the "court may" or a "party in interest may" do thus and so, the election to avoid a constructively fraudulent transfer is specifically delegated to "the trustee." As debtor-in-possession with all the rights of a trustee under Section 1107, NPCI has requested and states that it is entitled to the avoidance remedy provided by the statute. In addition, NPCI argues that the avoidance remedy is consistent with the objectives of both the Bankruptcy Code and Section 309(j) of the Federal Communications Act. Referring to the overarching bankruptcy policy favoring reorganization, NPCI stresses that avoidance of the obligation is vital to NPCI's reorganization.

The literal terms of Section 544 (as well as Section 548 and California Civil Code § 3439.07) appear to call for avoidance of the entire obligation where the statutory criteria for avoidance are met. Recognizing that avoidance of the entire obligation would be inappropriate in many cases, particularly where a constructively fraudulent transaction is at issue and the claim is not based upon any element of bad faith on the part of the obligee, NPCI asserts that the FCC should be entitled to a claim

in the amount of $1,023,211,000 representing the value conferred as found in the May 12 Decision. NPCI has already paid $474,364,806, leaving a balance due of $548,846,194 to be paid in accordance with the installment provisions of the FCC regulations.

As a practical matter this remedy results in avoidance of the $3,720,437,000 portion (the "Fraudulently Incurred Obligation") of NPCI's total bids for its 63 C block licenses which exceeded the combined value of those licenses and the 3% Payment.

FCC

In its Supplemental Memorandum of Law Regarding Remedy, the FCC observes that this case arises at the intersection of the Bankruptcy Code and the Federal Communications Act, and that this Court must give effect to both statutes if possible. To this end, the FCC asserts that:

> [T]he Court must honor two essential principles: (1) as between debtor [NextWave] and the FCC, the entire $4.74 billion C block payment obligation remains valid and is only partially avoidable to the extent necessary to benefit NextWave's *bona fide* creditors; and (2) NextWave cannot retain its 63 C block licenses without satisfying its auction bids in full.

FCC Memo on Remedy at 2. To accomplish these objectives, the FCC concludes its Memorandum on Remedy by asserting that the Court should:

> . . . (1) order NextWave to surrender its 63 C block licenses to the FCC; (2) allow the FCC to retain all of NextWave's down payments in partial satisfaction of its unavoidable claim, or, in the alternative, to retain $142,309,000 in down payments, direct that the remaining $332,055,806 in

> down payments be paid to NextWave's estate, and permit the FCC to file an unsecured claim against NextWave's estate for any deficiency in its recovery of $1,023,211,000; and (3) subordinate the FCC's claim for the [Fraudulently Incurred Obligation] to the general unsecured claims.

Id. at 13.

Unsure of the meaning and purpose of the FCC's remedial objectives, the Court requested clarification of its position at the May 26 hearing. In explaining its primary objective, the FCC acknowledged or stated among other things:

- Money is not the end goal. . . . Money is not the objective. (5/26/99 Tr. at 30)
- The objective is "[a] fair and efficient allocation of the limited resource of radio spectrum." (*Id.* at 31)
- "The bid amount, as I said, is what ties the whole process back to the statute and brings it to the heart of the regulatory purpose of congress in adopting a competitive bidding system to allocate the limited resources spectrum. It is the bid amount which drives the industry from the prospective [sic] of allocation spectrum. . . . And the FCC . . . has determined that the bid price is paramount to achieve those ends." (*Id.* at 31-32)

Still uncertain of the FCC's primary objective and theory of remedy, the Court asked whether the FCC would seek rescission (*i.e.*, return to the FCC of the 63 licenses and return to NPCI of the $473 million of de-

posits) as an alternative if the remedy proposed by the FCC were rejected. The FCC responded that its paramount interest is in getting the licenses back, but stressed to the Court that rescission is "not what we seek" (*id.* at 29).

In short, the FCC wants to recover the 63 licenses, keep the $473 million of deposits or, in the alternative, keep the $142,309,000 3% Payment and an unsubordinated "deficiency claim" (*i.e.*, $1,023,211,000 less $142,309,000 less whatever the FCC may receive from its resale of the licenses) and, in addition, retain an allowed claim in NPCI's Chapter 11 case for the entire $3.7 billion Fraudulently Incurred Obligation subordinated to existing, but not future, unsecured creditors and, of course, senior to equity both old and new. Not surprisingly, the FCC cites to no case law supporting this astonishing and novel remedy for constructive fraudulent conveyance, and for the reasons discussed below the Court sees no reason to grant it.

GOVERNING LEGAL AUTHORITIES

This Court's fashioning of a remedy is guided by the canon that statutory interpretation begins with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 85 L. Ed. 2d (1985). *See also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-42, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (a statutory provision that is clear on its face should be given full force and effect); *Central Trust Co. v. Official Creditors' of Geiger Enterprises, Inc.*, 454 U.S. 354, 359-60, 102 S. Ct. 695, 70 L. Ed. 2d 542 (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)) ("[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms").

Section 544(b) of the Bankruptcy Code provides: "The trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law. . . ." Section 544(b) incorporates non-bankruptcy law to supplement the trustee's avoiding powers under the Bankruptcy Code. The avoidance powers are intended to promote equitable distribution among creditors by bringing improperly transferred property back into the debtor's estate. *In re Best Products Co., Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y 1994) ("[f]raudulent transfer laws are intended to promote payment to creditors"). Specifically, Section 544(b) allows the trustee or debtor-in-possession in a case under Chapter 11 to invoke the rights of an existing unsecured creditor to set aside a transaction that is voidable under applicable state law.

An essential element in the exercise of the avoidance powers in Section 544 *et seq.* of the Bankruptcy Code is that the remedy be "for the benefit of *the estate*." 11 U.S.C. § 550(a), emphasis supplied. Section 550 thereby places an equitable restraint on the exercise of avoiding powers. The "estate" comprises all interests, including all creditors and equity. Thus, it might be inappropriate to use the avoiding powers if the benefit accrued only to the equity or to only one creditor or one class of creditors. Under the "benefit of the estate" standard, "what matters is whether creditors will receive 'some benefit from the recovery of the [challenged transfers].'" *In re Kennedy Inn Associates*, 221 B.R. 704, 715 (Bankr. S.D.N.Y. 1998) (quoting from *In re Centennial Industries, Inc.*, 12 B.R. 99, 102 (Bankr. S.D.N.Y. 1981). *See also In re Glanz*, 205 B.R. 750, 758 (proper standard is "that recovery by [the debtor] will increase [the debtor's] assets and improve its financial health to the extent that the likelihood is improved of its being able to satisfy its obligations to its creditors under [a] Plan").

Recovery of the avoided transfer is appropriate even if the benefit to the estate is indirect. 5 *Collier on Bank-*

ruptcy ¶ 550.02[2], p. 550-7 (15th ed. 1998). The term "estate" is broader than the term "creditors," *In re Trans World Airlines, Inc.*, 163 B.R. 964, 972 (Bankr. D. Del. 1994), and benefit has been interpreted broadly to include an indirect benefit such as an increase in the probability of a successful reorganization. *See*, *In re Tennessee Wheel & Rubber Co. (Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet)*, 64 B.R. 721, 725-26 (Bankr. M.D. Tenn. 1986), *aff'd*, 75 B.R. 1 (M.D. Tenn. 1987); *In re Sweetwater*, 884 F.2d 1323, 1326-7 (10th Cir. 1989) (the Tenth Circuit found that if the estate representative appointed pursuant to section 1123(b)(3)(B) realized more cash from the fund's assets than the allowed amount of administrative claims, the remainder would go to the reorganized debtor, which would then be in a better position to meet its financial commitments, if any, under the plan); *In re Acequia, Inc.*, 34 F.3d 800, 811-12 (9th Cir. 1994) (allowing recovery of fraudulent transfers even though unsecured creditors have been paid in full when recovery would aid continuing performance of post confirmation obligations and reimburse the bankruptcy estate for fraudulent conveyance litigation costs); *In re Trans World Airlines, Inc.*, 163 B.R. at 973 ("basic purpose of recovery pursuant to § 550(a) is to enlarge the estate for the benefit of creditors . . . whether any of it is distributed is a function of the conduct of the case and the negotiations of the plan of reorganization"); *In re Centennial Industries, Inc.*, 12 B.R. at 102 (recovery sufficient so long as unsecured creditors received some benefit from the recovery of the preferences, even if it was not an increase in the amount they would receive).

Section 544(b)'s avoidance remedy fosters the overall bankruptcy policy favoring reorganization. *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y. 1997) ("[p]ublic policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant

preservation of jobs and going concern values"); *In re Paris Indus., Corp.*, 106 B.R. 339, 341 (Bankr. D. Me. 1989) ("The Bankruptcy Code embodies a governmental policy favoring reorganization and a fresh start"); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527, 528, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984) ("policy of Chapter 11 is to permit successful rehabilitation of debtors . . . fundamental purpose of reorganization is to prevent a debtor from going into liquidation").

Contrary to the FCC's position that avoidance be limited to the extent of the claims of existing creditors, it is well settled that once an obligation is deemed voidable the entire transfer is avoided to the extent necessary to benefit the estate, without regard to the size of the claims of the existing creditors whose rights and powers the debtor-in-possession is asserting. *See* 5 *Collier on Bankruptcy* ¶ 544.09[5], p.544-21(15th ed. 1998) (discussing *Moore v. Bay*, 284 U.S. 4, 52 S. Ct. 3, 76 L. Ed. 133 (1931)). Under Section 544(b) "if the transfer is avoidable at all by any creditor, it is avoidable in full for all creditors regardless of the dollar amount of the prevailing claim." *In re Acequia, Inc.*, 34 F.3d at 810 (quoting *Abramson v. Boedeker*, 379 F.2d 741, 748 n.16 (5th Cir.), *cert. denied*, 389 U.S. 1006, 88 S. Ct. 563, 19 L. Ed. 2d 602 (1967)). *See also*, *In re Theisen*, 45 B.R. 122, 126-27 (Bankr. D. Minn. 1984) ("[O]nce avoidability is determined under state law, the transfer is entirely avoidable by a trustee in bankruptcy regardless of the amount of the creditor's claim relied upon by the trustee," discussing *Moore v. Bay* doctrine).

In this case, the appropriate remedy is avoidance of the entire obligation and reinstatement of the obligation to the extent of value given. While the literal terms of the applicable statutes (Section 544(b) of the Bankruptcy Code, which incorporates Cal. Civ. Code § 3439.04) and the case law provide for avoidance of the entire obligation, both bodies of law also offer protection to a good

faith obligee. Section 548(c) of the Bankruptcy Code provides in pertinent part:

> to the extent that an . . . obligation . . . is voidable under section 544 . . . a[n] obligee of such . . . obligation that takes for value and in good faith . . . may enforce any obligation incurred . . . to the extent that such . . . obligee gave value to the debtor in exchange for such . . . obligation.

11 U.S.C. § 548(c). California's Uniform Fraudulent Transfer Act contains a similar provision.[1] Cal. Civ. Code § 3439.08(d) states:

> Notwithstanding voidability of . . . an obligation, . . . a good faith . . . obligee is entitled, to the extent of value given the debtor for the . . . obligation, to . . . enforcement of any obligation incurred.

Thus, when an obligation is avoided under Section 544(b) of the Bankruptcy Code, both statutes entitled the obligee to enforce the obligation to the extent of value given the debtor. Recognizing yet another canon of statutory construction, namely "that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," the proper remedy lies in Section 548(c) of the Bankruptcy Code. *See In re Granite Partners, L.P.*, 208 B.R. 332, 341 (Bankr. S.D.N.Y. 1997) (discussing restriction of remedial provisions of securities laws as interpretive analogies to Bankruptcy Code Section 510(b), citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) and quoting *Transamerica Mort-*

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[1] The legislative committee comment to Cal. Civ. Code § 3439(d) acknowledges that the statute was adapted from section 548(c) of the Bankruptcy Code.

gage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)); *see also Patterson v. Shumate*, 504 U.S. 753, 759, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992), (statute must be enforced according to its terms) and *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (plain meaning of statute governs unless demonstrably at odds with drafters' intent). Accordingly, the FCC has a valid claim that is enforceable to the extent of value given the debtor, less the sum already paid by the debtor.

The case law is consistent with the remedy expressed on the face of Section 548(c). *See, In re Telesphere Communications, Inc.*, 179 B.R. 544, 559 (Bankr. N.D. Ill. 1994) (lenders entitled to enforce their obligation to the extent of value given [the debtor]); *In re Wes Dor, Inc.*, 996 F.2d 237, 243 (10th Cir. 1993) (finding transferee liable for amount of transfer minus value extended to the debtor); *Covey v. Commercial Nat'l Bank of Peoria*, 960 F.2d 657, 662 (7th Cir. 1992) (avoiding subsidiary's guarantee of parent's debt in excess of value given to the subsidiary).

CONCLUSIONS ON REMEDY

While NPCI urges the Court to apply Section 544 as written, the FCC urges the Court to use "remedial flexibility." Since Section 544(b) is clear on its face and under the case law, the Court will apply the statute as written, mindful of the Supreme Court admonition that statutes should be enforced as written. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 240-42, 109 S. Ct. 1026 and *Patterson v. Shumate*, 504 U.S. at 759, 112 S. Ct. 2242.

The statutory remedy is avoidance of the entire obligation upon a finding of fraudulent conveyance. *See In re Acequia, Inc.*, 34 F.3d at 809-10 ("[a] transaction that is voidable . . . may be avoided in its entirety"). However, the FCC may enforce NPCI's obligation to the ex-

tent it provided value to the debtor's estate. Stated differently, only the Fraudulently Incurred Obligation will be avoided.

The purported "remedy" urged upon the Court by the FCC in this fraudulent conveyance proceeding exhibits "remedial flexibility" to such an extent that it barely merits discussion. In the face of a statute of Congress intended to rectify inequities among creditors and facilitate reorganization of debtors, and despite this Court's finding of fact after trial that NPCI's indebtedness to the FCC was roughly five times the value of the C block licenses when conveyed, the FCC has proposed as a "remedy" that it should reclaim the licenses and, at the same time, retain all or a substantial portion of the $473 million paid by NPCI for the licenses and retain a claim in NPCI's bankruptcy for the $3.7 billion Fraudulently Incurred Obligation subordinated only to existing unsecured debt. Such a decree would reduce the value conveyed by the FCC to NPCI from $1.023 billion to zero ($0.00) while allowing the FCC to retain up to $473 million of the debtor's money and a subordinated claim for $3.7 billion. It would render NPCI hopelessly insolvent and result in prompt conversion to Chapter 7 and liquidation of this debtor.

The utter irrationality of the FCC's proposed remedy is manifest from the fact that, if the FCC reclaims the licenses, every dollar of cash and every dollar of allowed claim retained by the FCC would itself automatically become a fraudulent conveyance, since the licenses constituted the FCC's only contribution to NPCI in exchange for its cash and debt obligation. In other words, the FCC asks the Court not to rectify but to compound the constructive fraudulent conveyance already adjudicated by ordering the debtor to return the entire value received from the FCC while allowing the FCC to retain much of what the debtor paid for that value.

The remedy proposed by NPCI and adopted by this Court is intuitively fair and equitable to both the gov-

ernment and the debtor's estate and implements both the letter and the spirit of the Federal and state statutes and the case law governing debtor-creditor relations. The FCC will retain an obligation for the full value of the consideration which it conveyed to the debtor. The avoidance remedy fully comports with the "benefit of the estate" standard of Section 550(a) in that the debtor's estate will be relieved of that portion of its financial obligation to the FCC for which it received no value and will be able to proceed promptly with a viable plan of reorganization, having access to the public financial markets which was precluded by reason of the $3.7 billion Fraudulently Incurred Obligation not backed by any asset value.

Although eschewed by the FCC, a more rational alternative to the avoidance remedy proposed by the debtor would be traditional rescission, which would achieve the FCC's purported primary objective of cancellation and return of the 63 C block licenses for reauction while returning the cash deposits to NPCI and canceling all debt to the FCC. But avoidance, not rescission, is the remedy mandated by the Bankruptcy Code. Moreover, the "benefit of the estate" test and the overarching policy of the bankruptcy laws favoring reorganization both weigh heavily in favor of the avoidance remedy, since the likelihood of a successful reorganization of NPCI appears to be high with the 63 C block licenses, and virtually nil without them.

The avoidance remedy is also far more consonant with the statutory objectives expressed in Section 309(j) of the Federal Communications Act than rescission. Under Section 309(j) the FCC was charged with achieving four clearly expressed objectives: (1) the development and rapid deployment of new wireless technology for the benefit of the public without administrative or judicial delays; (2) promotion of economic opportunity and competition by disseminating licenses among a wide variety of applicants including entrepreneurial, small

businesses; (3) recovery for the public of a portion of the value of radio spectrum; and (4) the efficient and intensive use of spectrum. 47 U.S.C. § 309(j)(3). Each of these statutory policy objectives is advanced by the avoidance remedy and inhibited by rescission.

First, rescission and cancellation of NPCI's 63 C block licenses would result in lengthy and indeterminate delay in the deployment and use of those licenses. Even if there were no appeal from this Decision by either party, there can be no assurance when or whether the FCC would reauction the licenses, and it is unlikely that any reauction would be commenced in less than eight or nine months, judging from the 1999 reauction. Any reauction could be expected to take three to four months, as in the case of past auctions, and the license approval process for the successful bidder(s) could be expected to take up to five months particularly in the event of a third-party challenge, as in the case of NextWave. Thus, a delay of twelve to eighteen months or possibly substantially more would be the likely result of rescission, which is significant in the highly competitive and rapidly moving wireless telecommunications industry.

Second, NPCI and its NextWave affiliates are not only qualified under Section 309(j) as entrepreneurial designated entities to hold C and F block licenses, but as the largest holder of PCS spectrum in the C/DIE/F blocks NextWave undoubtedly would constitute the only potential candidate to compete with the major players such as AT&T, Sprint and NextTel which the FCC's trial expert, Dr. Salant, viewed as a prime objective of the C block auction. If NPCI's 63 C block licenses were cancelled and reauctioned, there can be no assurance that NextWave or any single bidder would succeed in winning all or most of the 63 licenses, or that the FCC would award the licenses to NextWave if it were the successful bidder. Moreover, NextWave's "carrier's carrier" business strategy could provide potential access to PCS spectrum for a variety of resellers of wireless

services and thereby "promot[e] . . . economic opportunity and competition by disseminating licenses among a wide variety of applicants including small businesses." 47 U.S.C. § 309(j)(3).

Third, although Section 309(j) charges the FCC only "to recover a portion of the value of the licenses for the public" (emphasis supplied), the avoidance remedy will recover for the public fisc $1.023 billion, which exceeds the full value of the 63 C block licenses ($908 million) as of February 1997. It would appear that this far exceeds the present fair market value of the 63 C block licenses, judging by the values achieved in the 1999 reauction of predominantly C block licenses.

Finally, the avoidance remedy will promote, the prompt, efficient and intensive use of PCS spectrum. Less than ten percent of the original C block licenses are currently in use. NPCI represents that it has conducted extensive site planning and/or radio frequency design in many of the markets covered by its C block licenses and has successfully installed PCS network equipment in trial systems in San Diego, San Antonio, Washington, D.C. and Las Vegas. As purportedly the only wireless provider dedicated to the wholesale "carrier's carrier" strategy, NPCI asserts that it will create competitive opportunities that do not exist in the wireless marketplace today, and may not exist in the event of rescission and reauction.

As to the FCC's subordination and "benefit to creditors" argument, *In re Best Products, Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y.), *aff'd*, 68 F.3d 26 (2d Cir. 1995) and *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 288 (Bankr. S.D.N.Y. 1990), cited in support of the FCC's contention that the $3.7 billion Fraudulently Incurred Obligation should be merely subordinated to existing unsecured creditors, rather than avoided, are conceptually inapposite. Both cases involved proceedings seeking to confirm reorganization plans and, in that context, approval of settlements of putative but unasserted

fraudulent transfer claims against lenders arising out of leveraged buy-out ("LBO") transactions involving the debtor. Regarding remedy, one court recognized that "[o]ne of the murkiest areas of fraudulent transfer law as applied to LBOs is what remedy to apply when the plaintiff prevails." *Best Products*, 168 B.R. at 57. In both *Best Products* and *Crowthers McCall* the lenders in question made loans to the respective debtors and took back promissory notes in precisely the amount of the consideration furnished by the lenders to the debtors, *i.e.*, the loans. The fraudulent transfer theory which might have been asserted against these lenders, and which was compromised in the context of the reorganization plans, was that the loans in question were merely steps in a series of transactions in connection with the LBOs by which the new shareholders, in effect, appropriated the loan proceeds to acquire the debtors' equity for their own personal benefit, thereby depriving the debtors and the debtors' other creditors of the economic benefits of the loans. The inherently "inside" nature of these LBO transactions generates a split of interest within the "estate" between the acquiring equity interest and their lender-funders versus the debtor's existing or "old" creditors. In such a context, it is not surprising that both courts would have employed language to the effect that the fraudulent transfer remedy, if any, should benefit the debtors' creditors, but that the indebtedness should be enforced vis-a-vis the debtors' equity shareholders who derived benefit to the extent of the money actually advanced by the lenders. In such a circumstance, the appropriate remedy might well be subordination, which would benefit the creditors harmed by the improper LBO diversion of the debtors' assets while leaving the lenders with a claim superior to the share-

holders for the fair value of the loans which they extended to the debtors.[2]

The constructive fraudulent conveyance claim involved in this adversary proceeding bears no resemblance to the putative fraudulent transfer claims which were the subject of *Best Products* and *Crowthers McCall*. The debts owing to the lenders in those cases which might have been subordinated, rather than avoided altogether, in the LBO context were supported dollar-for-dollar by loans actually advanced to and received by the debtors. To avoid those debt obligations would deprive the lenders of consideration actually given and resulted in a windfall for the shareholders who allegedly were the real beneficiaries of the loan proceeds. By contrast, neither NPCI nor its shareholders or creditors received any consideration from the FCC in respect of the $3.7 billion Fraudulently Incurred Obligation, and to enforce that Obligation even as subordinated debt would constitute a windfall for the FCC. Moreover, the settlements of the putative fraudulent transfer claims against the lenders in *Best Products* and *Crowthers McCall* were approved in the context of seeking to approve those debtors' reorganization plans. By contrast, in this case to allow $3.7 billion as a subordinated claim would preclude NPCI's access to public funding and thereby undermine any practical likelihood of NPCI's success as a reorganized debtor.

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[2] It should be emphasized that the language relied upon by the FCC in the *Best Products* and *Crowthers McCall* decisions did not constitute holdings by the respective bankruptcy courts determining remedies in litigated fraudulent conveyance claims. The courts in both cases were merely discussing the hurdles which the debtors might face in the context of approving settlements of possible fraudulent transfer claims which were not, in fact, litigated.

Finally, Judge (now Chief Judge) Brozman's decision in *Best Products* expressly recognizes the appropriateness of the remedy fashioned in this decision in a case such as this involving avoidance of an obligation for which the debtor received no consideration. Judge Brozman noted:

> On the other hand, if the underlying fraudulent transfer statute (such as DCL § 273) provides for the avoidance as fraudulent of an obligation incurred, it could be argued fairly persuasively that so much of the obligation which the debtor incurred as was not supported by consideration *to the debtor*, ought be avoidable. (emphasis in original)

Best Products at 59, citing *In re Candor Diamond Corp.*, 76 B.R. 342 (Bankr. S.D.N.Y. 1987).

Nor can the FCC take comfort from the citation and quotation of *In re Vintero Corp.*, 735 F.2d 740, 742 (2d Cir.) ("To the extent that [a debtor's] other creditors . . . are not affected adversely by enforcement of [an avoidable] security interest, there is no reason why such interest should not be enforced"), *cert. denied*, 469 U.S. 1087, 105 S. Ct. 592, 83 L. Ed. 2d 702 (1984). There can be no question that the debtor and its shareholders and its creditors would be affected adversely by any enforcement of the $3.7 billion Fraudulently Incurred Obligation in exchange for which the FCC provided no consideration to the debtor.

Finally, the FCC's arguments based upon *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986), *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984), *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400 (Bankr. N.D.Ohio 1983) and *In re Nitec Paper Corp.*, 43 B.R. 492 (S.D.N.Y. 1984) to the effect that bankruptcy pro-

ceedings cannot be used to override the regulatory authority of administrative agencies have been fully dealt with in this Court's December 7, 1998 decision on the FCC's motion to dismiss for lack of subject matter jurisdiction and June 16, 1999 decision denying the FCC's motion to lift the automatic stay. Reference is made to those decisions. Suffice it here to say that the issues before this Court in this adversary proceeding concern solely the debtor-creditor relationship between the FCC and NPCI. Nothing in the Federal Communications Act or elsewhere in the law exempts the FCC from the operation of the Bankruptcy Code in *its capacity as a creditor*. Nothing in this Court's May 12 Decision or in this Decision on Remedy implicates the FCC's regulatory jurisdiction.

NPCI is entitled to judgment in accordance with this Decision.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
NEXTWAVE PERSONAL COMMUNICATIONS INC., et al.,	:	Case No. 98 B 21529 (ASH)
Debtors.	:	(Jointly Administered)
	:	Adversary Proceeding No. 98-5178A
NEXTWAVE PERSONAL COMMUNICATIONS, INC.,	:	
Plaintiff,	:	
v.	:	
FEDERAL COMMUNICATIONS COMMISSION,	:	
Defendant.	:	

ORDER DENYING FCC'S MOTION FOR JUDGMENT ON THE PLEADINGS

On the 2nd day of April, 1999, came on for consideration the Motion (the "Motion") of the Federal Communications Commission (the "FCC") for Judgment on the Pleadings. After having reviewed the pleadings and heard arguments of counsel; the Court having jurisdiction over the above-captioned Chapter 11 cases pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of Reference for this District dated July 10, 1984 (Ward, Acting C.J.); and this matter being a core proceeding under 28 U.S.C. § 157(b)(2); it is hereby

ORDERED that the FCC's Motion is DENIED.

Dated: White Plains, New York

April 15, 1999

/s/
ADLAI S. HARDIN, JR.
UNITED STATES BANKRUPTCY JUDGE

In re NextWAVE PERSONAL COMMUNICATIONS, INC., et al., Debtors.

Nextwave Personal Communications, Inc., Plaintiff,

v.

Federal Communications Commission, Defendant.

Bankruptcy No. 98 B 21529 (ASH), Adversary. No. 98-5178A

United States Bankruptcy Court, S.D. New York

235 B.R. 272

February 16, 1999

Andrews & Kurth L.L.P., By Deborah L. Schrier-Rape, Dallas, TX, for plaintiff/debtor.

Mary Jo White, United States Attorney for the Southern District of New York, By Daniel S. Alter, New York City, for defendant.

DECISION ON PARTIAL SUMMARY JUDGMENT MOTION

ADLAI S. HARDIN, Jr., Bankruptcy Judge

Nextwave Personal Communications, Inc. ("Nextwave" or "debtor") commenced this adversary proceeding to set aside its aggregate $4.7 billion of transfers and obligations to the Federal Communications Commission ("FCC") incurred in its acquisition of 63 broadband Personal Communication Services licenses ("C Block licenses") as a constructive fraudulent conveyance under 11 U.S.C. § 544(b). The FCC has moved for partial summary judgment under Bankruptcy Rule 7056(b) to determine the effective date of Nextwave's $4.74 billion of transfers and obligations for purposes of Section 544(b). As set out below, I find that the effective date of the debtor's $4.74 billion of transfers and

obligations under Bankruptcy Code Section 544 is January 3, 1997.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference of Acting Chief Judge Robert J. Ward dated July 10, 1984. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

UNDISPUTED FACTS

The following facts are undisputed by the parties. The FCC conducted an auction of C block licenses from December 18, 1995 to May 6, 1996, and a reauction of C block licenses from July 3 to July 16, 1996. The debtor participated in the bidding in both of these auctions and was declared the high bidder on May 8, 1996 for 56 C block licenses and on July 23, 1996 for an additional 7 reauctioned C Block licenses, for a total of 63 C Block licenses.

As part of the FCC's auction process, bidders were required to deposit "qualifying amounts" in order to participate in the auction. The debtor deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. After the debtor was declared the winning bidder on May 6, 1996 as to the 56 C Block licenses, it deposited an additional $130,834,333 on May 10, 1996 and further deposit of $20,138,825 on July 23, 1996 when it was declared the winning bidder for the 7 C Block licenses. The debtor's deposits at the close of the bidding process totaled $237,182,402, or approximately 5% of the $4.7 billion it bid for all 63 C Block Licenses.

Following the close of the auction process, FCC regulations required the debtor to submit applications for approval of the issuance of the 63 C Block licenses. The debtor submitted applications as to the 56 and 7 C block licenses on May 22 and July 17, 1996, respectively.

While these applications were pending, two rival bidders, Antigone Communications L.P. and PCS Devco, Inc., petitioned the FCC to deny the debtor's applications on various grounds. The FCC investigated the matter and found that certain elements of NextWave's capital structure exceeded statutory foreign ownership benchmarks. In response, the debtor filed a restructuring plan with the FCC on December 30, 1996 to bring its capital structure into compliance with FCC regulations. On January 3, 1997, the FCC conditionally granted licenses for all 63 C Block licenses, subject to the debtor's implementation of its proposed capital restructuring plan.

Following the FCC's January 3, 1997 license grant, the debtor was required to deposit an additional 5% of the total $4.74 billion bid price, or a further $237 million. The debtor deposited this additional amount on January 9, 1997, raising its total deposits to $474 million. On February 19, 1997 the debtor signed notes dated January 3, 1997 in the aggregate principal amount of $4.27 billion (the "Notes") for the balance of the $4.74 billion it bid at auction.

DISCUSSION

The parties dispute the date on which the debtor incurred its $4.74 billion obligation to the FCC. That date is relevant for purposes of the debtor's avoidance claim under Bankruptcy Code Section 544(b), which provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property *or any obligation incurred* by the debtor that is voidable under applicable law . . .

11 U.S.C. § 544(b) (emphasis added). Because the FCC has moved only for a determination of that date, this decision is limited to a finding of fact and conclusion of law as to that date and does not address any remaining

factual or legal issues regarding the debtor's Section 544 claim.

The FCC argues that the debtor incurred its obligations when "the hammer fell" at the C Block auctions on May 8 and July 23, 1996. The debtor argues that it did not incur the obligations at issue in this proceeding until at least January 3, 1997,[1] the date on which the FCC conditionally granted the licenses and the effective date of the Notes.

The resolution of this motion must follow from identifying precisely which obligation the debtor seeks to avoid. Stripped to its essential proposition, the debtor's Section 544 claim is that it did not receive reasonably equivalent value in the C Block licenses it was granted in return for its $4.74 billion obligations. To measure the reasonable equivalence in value of the C Block licenses and the obligations incurred therefor, one must ask (i) when did the debtor receive the licenses and (ii) when did it become obligated to pay for them. These questions are determined by the rules governing the auction itself. *See In re Wilson Freight Co.*, 30 B.R. 971, 975 (Bankr. S.D.N.Y. 1983) (announced terms of auction binding upon participants). Those rules are found in the FCC regulations governing the auction process at 47 C.F.R. §§ 1.2101-1.2111, entitled "Subpart Q, Competitive Bidding Process."

With regard to question (i), both sides agree that the winning bidder neither received nor became entitled to receive the C Block licenses upon being declared the winning bidder under the FCC regulations. The winning

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[1] While it did not actually execute its Notes for the balance of its bid until February 19, 1997, the debtor does not contest using the effective date of the Notes, January 3, 1997. (Debtor's Memorandum at 8, note 2).

bidder must apply to the FCC, complete the regulatory approval process and perhaps (as in this debtor's case) overcome objections. The winning bidder has no legal right to receive or utilize the licenses bid upon unless and until its application is approved by the FCC. All the debtor received on May 8 and July 23, 1996 when it was declared high bidder was the exclusive right to apply for the 63 licenses. As stated by the FCC's counsel at a hearing in this Court on January 28, 1999 (Tr. at 15):

> THE COURT: Wait a second. You're asking for words, namely, "reasonably equivalent value" and that raises a question of value for what? And equivalent to what?
>
> MS. SCHWARTZ: To what they got.
>
> THE COURT: What did they get?
>
> MS. SCHWARTZ: What they got was the right to apply for these licenses that were essential to their business. And without those licenses, they would have no business.

Thus, the debtor did not become entitled to receive the 63 C Block licenses until at the earliest the January 3, 1996 decision of the FCC granting the debtor's applications.

Under FCC regulations, once bidding has ended the FCC must notify the high bidder and declare bidding closed. 47 C.F.R. § 1.2107(a). Within five days of the notification, the winning bidder who is a "qualified designated entity" (as is the debtor) must bring its total deposits up to 10% of its bid as a downpayment. 47 C.F.R. § 1.2107(b). Significantly, once the downpayment is tendered, the FCC holds the downpayment:

> until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not

> be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties.

Id. In other words, one of three events must occur after the winning bidder tenders the down payment but before award of the license: either the winning bidder pays the balance of the bid, in which case the downpayment is applied toward the license, or the winning bidder defaults, or the winning bidder is disqualified. Significantly, if the winning bidder defaults or is disqualified, although penalties may be assessed under Section 1.2104, the downpayment must be returned net of any penalties.[2]

Nor is the obligation on the full amount of the bid fixed upon tender of the down payment. A winning bidder who timely submits its downpayment must also submit a "long-form" application for license approval in its respective areas of service. 47 C.F.R. § 1.2107(c). If the bidder fails to timely submit its application, it is deemed to have defaulted and is subject to Section 1.2104 penalties. *Id.* The bidder's default subjects it to applicable penalties to be subtracted from the downpayment, but does not leave the bidder liable on the full amount of the bid.

These provisions make it clear that the debtor was not legally bound on the full amount of its winning bid upon being declared the high bidder. At the "fall of the hammer" the debtor did incur a potential liability in the

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[2] It appears that one party in the bidding process, BDCPS, Inc., in fact failed to timely submit its downpayment, thereby defaulting, and was assessed a penalty in accordance with Section 1.2104, but there is no indication that the full amount of its high bid was assessed. (Exhibit J to debtor's Memorandum in Opposition).

event that it either defaulted or was disqualified (neither of which occurred in this case), but under the FCC regulations that potential liability was quite different from the amount of the winning bid.

The potential default liability incurred at the fall of the hammer consisted of penalties calculated on the basis of the difference between the winning bid and the winning bid at any subsequent reauction if any, plus applicable percentage penalties. *See* 47 C.F.R. § 1.2104. Nothing in this calculation explicitly or implicitly binds the winning bidder to the full amount of its bid. Indeed, the express requirement that the downpayment be refunded less any penalties in the event of default or disqualification negates any implied liability for the full amount of the bid. The penalty obligations upon default or disqualification are entirely separate from -- and mutually exclusive of -- the obligations the bidder would incur upon granting of the license and tender of the balance of the bid. Whether the debtor might have been liable for any of these penalty amounts is not at issue.

Having determined that the debtor's liability for the full amount of the obligation did not attach upon its being declared the high bidder, nor upon tender of the down payment or even submission of the license approval application, the issue remains as to when the full liability did attach.

The auction rules provide that the grant of a license is expressly conditioned upon payment of the balance of the obligation. Section 1.2109(a) provides:

> Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days *following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.*

47 C.F.R. § 1.2109(a) (emphasis supplied). If the bidder fails to satisfy Section 1.2109(a), the license application is deemed dismissed, the bidder is liable for Section 1.2104 penalties against the downpayment, and the FCC may either reauction the license or offer it to the next highest bidder. 47 C.F.R. § 1.2109(b). Similarly, any bidder who is found unqualified, defaults in timely remitting the balance of the bid or is disqualified becomes liable for Section 1.2104 penalties, after which the FCC may conduct a new auction. *Id.* Taking these sections together, had the debtor failed to tender the balance or otherwise defaulted, it would have been liable only for the Section 1.2104 penalties against its downpayment. Thus the earliest date at which the debtor could have been liable for the full amount of its bid obligations is the date it complied with Section 1.2109(a) by paying the balance of its cash obligations and issuing the Notes. The debtor complied with Section 1.2109(a) effective at the earliest on January 3, 1996 by tendering the balance of its bids in cash and the Notes. It thereby became liable for the full amount of its bid obligations by reason of its Notes.

To summarize, under the FCC regulations it is clear that the debtor incurred a contingent liability for default by entering into the bidding process and by being declared the high bidder. However the contingent default obligations that the debtor might have incurred by participating in the bidding process (which were never actually incurred by the debtor) were quite different from the debtor's obligations for the full amount of its bids, which only became fixed upon its tender in cash and the Notes of the balance due on the C Block licenses granted on January 3, 1997. That obligation, not the contingent penalty obligations, is the subject of the debtor's Section 544 avoidance action.

It is apparent that the FCC's position on this motion is incongruent both with its own regulations and with the debtor's claim in this adversary proceeding. The con-

structive fraudulent conveyance claim asserts that the aggregate consideration given by the debtor effective January 3, 1997 for the 63 licenses *(i.e.,* the cash transfers totaling $474 million and the Notes totaling $4.26 billion) was not reasonably equivalent to the value of the licenses granted on January 3, 1997. In arguing that May 8 and July 23, 1996 are the debtor's liability dates for valuation purposes, the FCC focuses not on the actual $4.7 billion purchase price which became effective January 3, 1997, but on the debtor's contingent exposure to default penalties which were never incurred and never could be incurred if the licenses were granted. Moreover, the property to be valued -- the licenses -- was not granted in May and June 1996, but on January 3, 1997.

For the foregoing reasons, I find as a matter of fact and law that the date upon which the debtor incurred its obligations to the FCC for purposes of Bankruptcy Code Section 544(b) is January 3, 1997.[3]

Counsel for the Nextwave and the FCC are directed to confer and jointly prepare an order, agreed as to form, consistent with this decision, without prejudice to the FCC's right to appeal.

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[3] The January 3, 1997 date is based upon the date of the FCC's decision granting the licenses and constitutes the earliest effective date of the debtor's obligations for purposes of this adversary proceeding under Section 544. This ruling is without prejudice to the right of either party to argue that a later date should be determinative if the difference is material.

In re NextWAVE PERSONAL COMMUNICATIONS, INC., et al., Debtors.

NextWave Personal Communications, Inc.,

Plaintiff,

v.

Federal Communications Commission,

Defendant.

Bankruptcy No. 98 B 21529 (ASH).

Adversary No. 98-5178A.

United States Bankruptcy Court,

S.D. NEW YORK.

235 B.R. 263

Dec. 7, 1998.

Andrews & Kurth L.L.P., By Deborah L. Schrier-Rape, Dallas, TX, for plaintiff/debtor.

Mary Jo White, United States Attorney for the Southern District of New York, By Daniel S. Alter, New York City, for defendant.

REVISED DECISION ON MOTION TO DISMISS

ADLAI S. HARDIN, Jr., Bankruptcy Judge.

Defendant Federal Communications Commission ("FCC") has moved to dismiss this adversary proceeding for lack of subject matter jurisdiction.[1]

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[1] The District Court denied the FCC's companion motion to withdraw the reference, remanding the motion to dismiss to this Court for decision.

The First Amended Complaint of plaintiff-debtor NextWave Personal Communications, Inc. ("NextWave" or the "debtor") contains two causes of action. The first alleges that NextWave's transfers to the FCC of deposits and secured promissory notes aggregating $4.7 billion in exchange for conditional grants of 63 C block lines on January 3, 1997 were constructive fraudulent conveyances subject to avoidance under 11 U.S.C. § 544. The second cause of action alleges that, by reason of the FCC's *de facto* control over NextWave and its "inequitable, unconscionable and unfair conduct" from the time of the C block auctions through the conditional grant of licenses on January 3, 1997, the FCC's liens and claims should be equitably subordinated to the claims of other creditors in the case, including intercompany and affiliate claims.

The motion to dismiss will be denied as to the first cause of action and granted as to the second. As amplified below, the first cause of action arises solely out of the FCC's status as a creditor of NextWave and does not seek to challenge any act or omission of the FCC or to affect the FCC in any manner except in its capacity as a creditor. By contrast, the second cause of action is based upon conduct of the FCC acting in its regulatory capacity. This Court will decline to review or adjudicate the consequences of the FCC's acts and omissions in matters over which Congress has granted the FCC primary jurisdiction.

JURISDICTION

This Court has jurisdiction over the debtor's Chapter 11 case by reason of 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference dated July 10, 1984 signed by Acting Chief Judge Robert J. Ward. This Court's jurisdiction with respect to the claims asserted in the adversary proceeding is the subject of this decision.

BACKGROUND[2]

As set forth in the FCC's main memorandum, prior to Congress' enactment of Section 309(j) of the Federal Communications Act ("FCA"), the House Committee on Energy and Commerce (the "Committee") recognized that the radio frequency spectrum is a "precious but limited resource [that] has become vitally important to our economic success and social well being." *See* H.R. Rep. No. 103-11 at 247-48 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 574-75. Noting that the congested state of the radio frequency spectrum limited the ability to accommodate new spectrum-dependent technologies and that existing procedures for issuing radio spectrum licenses by lottery and comparative hearings had resulted in regulatory inefficiencies and permitted licensees to exploit a national resource unjustly, the Committee concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.

Id. at 580.

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[2] The facts set forth below are drawn from the parties' briefs and the First Amended Complaint. The factual recitation which follows does not constitute "findings of fact" but is intended to provide the factual matrix giving rise to the parties' dispute in order to give context for the decision below. While the parties may differ on particular points of fact referred to herein, it is the Court's view that such differences would not be material to the ultimate factual and legal issues presented on this motion to dismiss.

In section 309(j) of the FCA Congress authorized the FCC to issue radio spectrum licenses to various categories of qualified applicants through a system of competitive bidding. 47 U.S.C. § 309(j)(1), (2). Among the categories of applicants, the FCC was directed by the statute to designate portions or "blocks" of the radio spectrum for auction to small, emerging businesses and to establish flexible, deferred license payment plans to enable such enterprises to participate in the communications industry. 47 U.S.C. § 309(j)(3)(B) and (4)(D). Consistent with this mandate, the FCC designated the C block for auction to small businesses providing Personal Communications Services ("PCS"), a new form of wireless communication technology.

On May 6 and July 16, 1996, the FCC conducted its C block auctions, in which some 90 bidders won the right to apply for 493 C block licenses at bid prices aggregating $10.2 billion. As mandated by the statute, successful bidders were obligated to pay 10% of their winning bids in cash and to pay the remaining 90% to the FCC in deferred installments. Consistent with the statutory mandate, the FCC enacted regulations authorizing payment of the remaining 90% over a period of ten years, with interest only for the first six years and principal and interest for the remaining four years. 47 C.F.R. § 24.711(b)(3). Below-market interest rates were provided to enable start-up companies to obtain financing through capital markets or private placement in order to make debt payments to the FCC and to "build out" their PCS networks.

NextWave is a start-up company organized to take advantage of the opportunities provided by section 309(j) in the fledgling PCS industry. NextWave was high bidder for a total of 63 C block licenses for amounts aggregating approximately $4.7 billion. As required, NextWave made 10% downpayments aggregating some $474 million. In late May and late July 1996, following the auctions in those months, NextWave sub-

mitted applications for the C block licenses upon which it was the winning bidder for review and approval by the FCC.

On September 17, 1996, C block licenses were granted to over 90% of the parties who had earlier been designated as making high bids for licenses in the C block. The FCC did not grant approval for NextWave's 63 C block licenses until January 3, 1997. Shortly thereafter, NextWave received from the FCC a series of promissory notes made payable to the FCC (the "Notes") aggregating $4.26 billion, representing the remaining 90% of the amount bid by NextWave for its C block licenses. NextWave executed the Notes on February 19, 1997.

On June 26, 1996 the FCC announced the date for commencement of the D, E and F block auctions, which were held on August 26, 1996 and concluded in January 1997. These blocks covered geographical areas across the country, including areas covered by the 63 C block licenses for which NextWave was awaiting FCC approval. The winning bids on the D, E and F block auctions were at a fraction of the winning bids in the C block auction.[3] The drastic devaluation in the C block

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[3] The C, D, E and F block radio spectrum licenses were allocated in specifically identified geographical areas, referred to as "Basic Trading Areas" ("BTAs"). A significant factor in the value of PCS licenses is the population or number of people served by the license, referred to colloquially as "Pops." Another variable in the value of a license is the carrying capacity of the wireless spectrum covered by the license, expressed in number of megahertz ("MHZ") of radio frequency. The price paid for a license can be quantified in terms of dollars per MHZ per Pops, or $/MHZ-Pops. NextWave bid an average of $1.43/MHZ-Pops for the 63 C block licenses for which it was high bidder. By contrast, the winning bids for the D, E and F block auctions reflected an

[Footnote continued on next page]

licenses, as reflected in the values of the subsequently bid D, E and F block licenses, is the central factor in the NextWave bankruptcy filing and in the debtor's adversary proceeding against the FCC.

As a consequence of the gross disparity between the values of the C block licenses and those of the D, E and F block licenses, many if not most or all of the C block licensees experienced great difficulty in obtaining necessary financing. As stated in the FCC memorandum:

> In early 1997, the FCC received several requests from C block licensees for relief from their installment payments that described a range of difficulties in accessing the capital markets... The FCC's Wireless Telecommunications Bureau ("Wireless Bureau") also received several proposals from C block licensees regarding alternative financing arrangements, as well as a petition for rulemaking regarding C block installment payments. In response to these requests, the FCC suspended the C block installment payments indefinitely, and initiated an elaborate administrative process for restructuring the C block license obligations.

After issuing public notice seeking comments, receiving over 160 filings in response, conducting a public forum in Washington, D.C. and reviewing further submissions thereafter, on October 16, 1997 the FCC issued a "Restructuring Order" which provided distressed C block licensees with four distinct, mutually-exclusive options regarding financial relief for C block licensees.

[Footnote continued from previous page]
average value of approximately $.35/MHZ-Pops for D and E block and $.246/MHZ-Pops for F block licenses.

In response to the Restructuring Order, the FCC received numerous petitions for reconsideration, oppositions, replies and *ex parte* filings. On March 24, 1998 the FCC issued a "Reconsideration Order," in which the FCC left intact the basic framework of the Restructuring Order, modifying it only slightly to allow licensees somewhat more flexibility in making their choices available under the Restructuring Order. The Restructuring Order and the Reconsideration Order are referred to collectively as the "Restructuring Orders."

On May 8, 1998 NextWave petitioned the FCC for further reconsideration of the Restructuring Orders, and on May 29, 1998 NextWave filed a petition for review of the Restructuring Orders with the District of Columbia Circuit Court. NextWave asked both the FCC and the Circuit Court for a stay of the June 8, 1998 deadline for its election of one of the four alternatives provided in the Restructuring Orders. Both the FCC and the Circuit Court denied NextWave's requests for stay of the June 8 deadline.

On June 8, 1998 NextWave filed its Chapter 11 petition together with the complaint in this adversary proceeding.

DISCUSSION

The basic legal principles of jurisdiction governing the outcome of this motion are established by statute and are not controversial.

Congress has vested in the Circuit Courts of Appeals exclusive jurisdiction to enjoin, set aside, annul or suspend orders of the FCC. 28 U.S.C. § 2341(1) and 47 U.S.C. § 402. *See FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996); *Media Access Project v. FCC*, 883 F.2d 1063, 1066 (D.C. Cir. 1989); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S. Ct. 1296, 108 L. Ed. 2d 474

(1990). The regulatory jurisdiction conferred by Congress on a Federal agency and the grant of exclusive jurisdiction to the Circuit Courts to review the agency's actions precludes a district court (or, by reference, a bankruptcy court) from enjoining, reviewing, assessing damages for or otherwise adjudicating the consequences of the conduct of the Federal agency acting within the scope of its Congressional mandate. *See, e.g., FCC v. ITT World Comms., Inc.*, 466 U.S. at 468, 104 S. Ct. 1936 ("[l]itigants may not evade these [jurisdictional] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order"); *Dougherty v. Carver Federal Savings Bank*, 112 F.3d 613, 620 (2d Cir. 1997) ("Where Congress has vested exclusive review of an agency action in the court of appeals, a district court cannot enjoin actions that are the natural outcome of the agency's decision"); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 91 S. Ct. 203, 27 L. Ed. 2d 203, (1970); *Pacific Power & Light Co. v. Bonneville Power Admin.*, 795 F.2d 810, 816 (9th Cir. 1986) (barring district court contract action as challenge to administrative rate determination solely reviewable by court of appeals); *Ordower v. Office of Thrift Supervision*, 999 F.2d 1183, 1188 (7th Cir. 1993) (district court did not have jurisdiction over action for breach of fiduciary duty which was, in substance, a challenge to an administrative ruling because the relief sought would "penalize action that the agency has approved or that is the natural outcome of the agency's decision"); *In re Olympia Holding Corp.*, 160 B.R. 185, 190-91 (N.D.Fla. 1993) (bankruptcy court had no jurisdiction over adversary proceeding that challenged Interstate Commerce Commission rule), *aff'd on other grounds*, 88 F.3d 952 (11th Cir. 1996).

Jurisdiction with respect to bankruptcy cases and proceedings is conferred by Congress on the district

courts under 28 U.S.C. § 1334, which provides in subsections (a) and (b) as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Congress has authorized the district courts to refer jurisdiction over bankruptcy cases to the bankruptcy judges for the district, and bankruptcy judges may hear and determine all "core proceedings" arising under Title 11, including proceedings relating to fraudulent conveyances. Section 157 provides in pertinent part as follows in subsections (a) and (b):

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to--

> (A) matters concerning the administration of the estate;
>
> * * *
>
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;

These statutory provisions confer upon the district and bankruptcy courts exclusive jurisdiction to administer the Bankruptcy Code and Rules and to resolve claims, adversary proceedings and contested matters arising under the Code. The role of the bankruptcy court is to adjudicate and adjust the rights of creditors and debtors in accordance with the Code. Nothing in section 309(j) of the FCA or any other statute confers any regulatory or other jurisdiction upon the FCC to make rules or other determinations with respect to its own status as a *creditor* vis-a-vis its debtors or other creditors of its debtors. No such jurisdiction is claimed by the FCC. By the same token, the Bankruptcy Code expressly recognizes the exclusive jurisdiction of regulatory agencies to perform the regulatory functions conferred upon them by statute. Thus, section 362 of the Bankruptcy Code governing the automatic stay, one of the centerpieces of the Code, provides an exception to the automatic stay in subsection (b)(4) for "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." However, as recognized by the FCC (Memorandum at ftn. 5 p.18), the FCC *in its capacity as a creditor* is subject to the Bankruptcy Code including the automatic stay. *See NLRB v. 15th Avenue Ironworks, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *Matter of Fugazy, Exp., Inc.*, 114 B.R. 865 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2nd Cir. 1992), *motion to vacate denied*, 159 B.R. 432 (Bankr. S.D.N.Y. 1993), *leave to appeal denied*, 163 B.R. 434 (S.D.N.Y. 1994).

The task on this motion is to determine whether the claims asserted against the FCC by NextWave affect

NextWave in its capacity as a creditor, or require this Court to examine, pass judgment upon and attach legal consequences to the conduct of the FCC acting within the regulatory jurisdiction conferred upon it by Congress.

The first cause of action

The first cause of action entitled "Fraudulent Conveyance of C Block Licenses to NPCI," paragraphs 63-70 of the First Amended Complaint, does not allege any regulatory conduct on the part of the FCC. It simply asserts that the "transfers" alleged in paragraphs 63-70, comprising the $475 million of deposits and the $4.26 billion of Notes executed by NextWave and transferred to the FCC, exceeded the value of the property received by NextWave from the FCC in exchange, namely, the 63 C block licenses, which are alleged to have had a value of less than $1 billion on February 19, 1997 when the Notes were executed by NextWave. The first cause of action seeks the equitable remedies of avoidance for the benefit of other creditors and the debtor available under 11 U.S.C. § 544. The claim asserted in the first cause of action is constructive fraudulent conveyance and implicates no conduct of the FCC. Whatever may be the merits of the first cause of action as a matter of bankruptcy law, this Court will not be called upon to adjudicate or attach any consequence to any act or omission of the FCC in its regulatory capacity. Congress has not vested in the FCC any regulatory power with respect to its status as a creditor or its rights to share with other creditors in the limited assets of its debtors. Nor has Congress deprived the district court or the bankruptcy court of jurisdiction under 28 U.S.C. §§ 1334(a) and 157(a) and (b) to hear and determine matters arising under Title 11, including 11 U.S.C. § 544.

The FCC argues that when Congress authorized it to allocate blocks of radio spectrum by competitive bidding "it was emphatic that the organization, execution and implementation of such auctions fell squarely within the

agency's regulatory power" (FCC Memo p. 11). That is unquestionably so, but the first cause of action does not seek to litigate any issue with respect to the organization, execution or implementation of the radio spectrum auctions.

Quoting from Commission Susan Ness, the FCC argues that "the Commission's fundamental role is that of a licensing agency, not that of a lender. . . Those who say the [FCC] functioned as a banker are mistaken. . . . We never assumed the responsibility of creating 'commercially reasonable alternatives' for whatever difficulties the C block licenses [sic] encountered" (FCC Memo pp. 14-15). Commissioner Ness is, of course, correct in acknowledging that Congress never conferred upon the FCC "the responsibility of creating 'commercially reasonable alternatives' for whatever difficulties the C block licenses [sic] encountered" -- indeed, Congress has provided in the Bankruptcy Code for the adjustment of creditors' rights and the fair allocation among creditors of the limited assets of a debtor. But Commissioner Ness is obviously incorrect in asserting, if that was her intent, that the FCC is not a creditor. There can be no dispute that the FCC is a creditor, and nothing in section 309(j) or elsewhere in the FCA or in the Bankruptcy Code states that the FCC is exempt from any of the provisions of the Code which affect it as a *creditor*.

At oral argument counsel for the FCC stated that the FCC's motion with respect to the first cause of action is dependent on the Restructuring Orders. In essence, the position is that the Restructuring Orders constituted final administrative determinations establishing the four mutually-exclusive alternatives for NextWave to readjust its $4.26 billion indebtedness to the FCC and, as final Orders, they may be reviewed only by the Circuit Court; any relief granted by the Bankruptcy Court under 11 U.S.C. § 544 would necessarily conflict with the Restructuring Orders and thereby invade the purported jurisdiction of the FCC and the Circuit Court. It is argued

that the adoption of the Restructuring Orders constituted an "intervening action" of the FCC which divested the Bankruptcy Court of jurisdiction which it might have had to administer those provisions of the Bankruptcy Code which would otherwise have applied to the FCC as a creditor.

The basic defec in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors. A fundamental objective of the Bankruptcy Code is to insure fairness and equality of treatment among creditors whose claims may vastly exceed the assets of the debtor, as in this case. Thus, the objective of fraudulent conveyance provisions is to insure that other creditors are not unfairly disadvantaged by the claim of a single creditor who, in a fraudulent or constructively fraudulent transaction, conveyed property to a debtor worth substantially less in value than the amount of its claim. Aside from fairness to other creditors, fraudulent conveyance and other provisions of the Bankruptcy Code are designed in part to facilitate the capacity of a debtor to reorganize and thereby repay its debts as they may be restructured in a confirmable plan. Nothing in Section 309(j) or elsewhere in the FCA even suggests that Congress intended to empower the FCC to promulgate orders which have nothing to do with its regulatory functions and which are designed solely to enhance the FCC's position as a creditor to the detriment of rights provided under the Bankruptcy Code for the benefit of other creditors and the debtor.

That is not to say that the FCC did not have the right to promulgate the Restructuring Orders, as expressing the alternatives to which the FCC would voluntarily agree for the relief of C block licensees. Any party, whether government agency or private person, may formulate alternatives which it, as a creditor, would be willing to accept for the relief of its debtors. But in the ab-

sence of a clear expression by Congress, neither a Federal agency nor a private person has the power to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws. The FCA does not grant the FCC any such power and, as shown in NextWave's submissions, Congress declined to pass a bill propounded by the FCC which would have expressly voided the Bankruptcy Court's jurisdiction in cases such as this.

Little need be said of the FCC's argument that the FCA preempts a state fraudulent conveyance claim. First, the FCC does not and cannot take the position that the FCA preempts Section 544 of the Bankruptcy Code. Second, a state law claim may only be preempted by federal law under three circumstances: (i) where Congress defines explicitly the extent to which its enactments preempt state law or, in the absence of such explicit statutory language, (ii) where state law "regulate[s] conduct in a field that Congress intended the Federal Government to occupy exclusively" or (iii) where state law "actually conflicts with federal law." *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). None of these circumstances exist in this case. Nothing in the FCA conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to authorize the FCC to dictate for itself a preferred creditor status at variance with state or Federal debtor-creditor laws or the Bankruptcy Code.

The second cause of action

The second cause of action of the First Amended Complaint is based exclusively on alleged misconduct of the FCC acting in its regulatory capacity. Thus, paragraph 92 alleges:

> 92. The FCC completely controlled all aspects of the C block auction process, in-

> cluding the rules, timing and manner in which the C block licenses were issued to NPCI. The C block licenses constitute all or substantially all of NPCI's assets. The FCC thus controlled NPCI's business and all of its assets.

Virtually every one of paragraphs 92 through 115, comprising the operative allegations of the second cause of action, allege conduct of the FCC in its regulatory capacity conferred under section 309(j), including such matters as the failure to inform NextWave that the FCC would commence and conclude bidding on the D, E and F blocks before NextWave received its license approvals (¶ 97), the destruction of the value of C block licenses by conducting the D, E and F block auctions (¶ 104), the FCC's unreasonable delay in granting NextWave's licenses (¶ 107) and the like, concluding with the general allegations in paragraphs 114 and 115 that the FCC was guilty of inequitable, unconscionable and unfair conduct resulting in injury to NextWave and its creditors and conferring an unfair advantage on the FCC.

The case law discussed above makes clear that district courts and by reference bankruptcy courts do not have jurisdiction to adjudicate the propriety of and attach legal consequences to the conduct of the FCC or other regulatory agencies acting within the scope of the powers conferred on them by Congress. That is precisely what the second cause of action would require this Court to do.

The fact that the remedy sought in the second cause of action, subordination, is one prescribed under the Bankruptcy Code, 11 U.S.C. § 510, is not relevant. As the cases make clear, neither the nature of the cause of action alleged nor the form or legal source of the relief sought is determinative of the jurisdictional question. *See Sutton v. U.S. Department of Transportation*, 38 F.3d 621, 625, 626 (2d Cir. 1994) ("[t]he exclusive jurisdiction of courts of appeals to review FAA determina-

tions based in substantial part on . . . [t]he [FAA] Act applies without regard to other substantive claims asserted in the complaint;" the fact that thd plaintiffs "characterized their challenge as a claim for violation of [non-FAA Act statutory provisions] does not change the fact that the substantive claims alleged in their complaint are based in substantial part on the FAA's determination made pursuant to . . . the [FAA] Act"); *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) ("Congress [did not intend] the exclusivity vel non of statutory review to depend on the substantive infirmity alleged"). Subject matter jurisdiction depends on whether the claim asserted arises from conduct of the agency which relates to "the substantive core of an agency's mandate." *City of Rochester*, 603 F.2d at 937.

It follows from the foregoing that this Court does not have subject matter jurisdiction to adjudicate the propriety of the FCC's regulatory conduct complained of in the second cause of action.

* * *

Counsel for NextWave and the FCC are directed to confer together and jointly prepare an order, agreed as to form, consistent with this decision, without prejudice to the right of either party to appeal.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of February, two thousand.

PRESENT: **HONORABLE DENNIS JACOBS,**
HONORABLE JOSEPH M. McLAUGHLIN,
Circuit Judges.*

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In re: NEXTWAVE PERSONAL COMMUNICATIONS,INC.,

Debtor.

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

v. 99-5063

NEXTWAVE PERSONAL COMMUNICATIONS, INC.

Appellee.

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ORDER

(1) The motion of NextWave Personal Communications for rehearing shall be and hereby is DENIED.

(2) The motion of the FCC for emergency modification of this Court's Order dated January 24, 2000,

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* The Honorable Robert D. Sack is recused.

shall be and hereby is GRANTED. The FCC is granted leave to file a petition for a writ of mandamus to this Court. If the FCC decides to do so, the FCC's petition and briefing will be filed on or before February 22, 2000. NextWave's response to the petition and briefing shall be filed on or before February 28, 2000. Pursuant to Fed. R. App. P. 21(b)(4), the Hon. Adlai S. Hardin, Jr., is invited to file a response, if he wishes to do so, by February 28, 2000. The filings shall address *inter alia* whether or not the Order of the United States Bankruptcy Court for the Southern District of New York, dated February 7, 2000, (as elucidated in its decision dated January 31, 2000) is within the terms of this Court's mandate pursuant to its decision of December 22, 1999. If deemed necessary by this Court, oral argument will be heard on three business days' notice, but not before March 6, 2000.

(3) The February 7 order of the bankruptcy court shall be and hereby is STAYED, pending determination of any petition for a writ of mandamus, insofar as that order prevents the FCC from taking steps in anticipation of the Auction of C and F block Broadband Personal Communications Services (PCS) Licenses presently planned for July 26, 2000, including the possible re-auction of the Licenses at issue between NextWave and the FCC, and rulings on the petitions filed by SBC Communications Inc. and Nextel Communications, Inc. regarding C- and F-Block PCS eligibility requirements.

(4) Except as modified by this Order, this Court's Order dated January 24, 2000, remains in effect.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk
By:

/s/
BETH J. MEADOR
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
40 Foley Square
New York, NY 10007

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of March, Two Thousand

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Federal Communications Commission

Appellant, 99-5063

v.

Nextwave Personal Communications, Inc.,

Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee Nextwave Personal Communications, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Roseann B. McKechnie, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

11 U.S.C. § 525

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

* * *

TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER III. THE ESTATE

11 U.S.C. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under sec-

tion 502 of this title or that is not allowable only unde section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I. ORGANIZATION OF COURTS
CHAPTER 6. BANKRUPTCY JUDGES

28 U.S.C. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title

(2) Core proceedings include, but are not limited to—

* * *

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

* * *

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 U.S.C. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals

under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART VI. PARTICULAR PROCEEDINGS

CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

28 U.S.C. § 2342

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to--

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d));

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SPECIAL PROVISIONS RELATING TO RADIO
GENERAL PROVISIONS

47 U.S.C. § 309

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application--

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(B) aeronautical en route stations,

(C) aeronautical advisory stations,

(D) airdrome control stations,

(E) aeronautical fixed stations, and

(F) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe, shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply--

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for--

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station

(F) authorizations pursuant to section 325(c) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where

no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section of this section (or subsection (k) of this section in the case of renewal of any broadcast station license. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and

material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evi-

dence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of operations under subsection (b)

When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorization for additional periods not to exceed 180 days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) Classification of applications

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any

other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

(i) Random selection

(1) General authority

Except as provided in paragraph (5), if there is more than one application for any initial license or construction permit, then the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b) of this title. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law--

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of the evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

(3) (A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection

used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4) (A) The Commission shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) Not later than 180 days after August 10, 1993, the Commission shall prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection.

(5) Termination of authority

(A) Except as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997.

(B) Subparagraph (A) of this paragraph shall not apply with respect to licenses or permits for stations described in section 397(6) of this title.

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed--

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or

guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the

Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter;

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the

same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of

Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 4(k) for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be paid to the Treasury;

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(9) Use of former government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that--

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act.

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless--

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act;

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act; and

(iv) the Commission has completed the rule-making required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if--

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act;

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act;

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act;

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) Commission has failed under section 332(c)(3) of this title to *grant or deny within the* time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2007.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report--

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent--

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences.

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall--

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)--

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications ser-

vice for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to--

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $ 400,000,000, and if such amount is less than $ 400,000,000, the Commission shall recover an amount equal to $ 400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of

new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994 and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension

The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that--

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market--

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either--

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

(C) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A) or (B), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection. The Commission shall complete the assignment of such licenses, and report to the Congress the total revenues from such competitive bidding, by September 30, 2002.

(D) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (C)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II)the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(k) Broadcast station renewal procedures.

(1) Standards for renewal

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this chapter or the rules and regulations

of the Commission which, taken together, would constitute a pattern of abuse.

(2) Consequence of failure to meet standard

If any licensee of a broadcast fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) Standards for denial

If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e), that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

(A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and

(B) only thereafter accept and consider such applications for a construction permit as may be filed under Section 308 of this title specifying the channel or broadcasting facilities of the former licensee.

(4) Competitor consideration prohibited

In making the determination specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

(l) Applicability of competitive bidding to pending comparative licensing cases

With respect to competing applications for initial licenses or construction permits for commercial radio or

television stations that were filed with the Commission before July 1, 1997, the Commission shall--

(1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit;

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date of enactment of the Balanced Budget Act of 1997.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION PROCEDURAL AND ADMINISTRATIVE PROVISIONS

47 U.S.C. § 402

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely

affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28 of the United States Code, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A—GENERAL
PART 1—PRACTICE AND PROCEDURE
SUBPART Q—COMPETITIVE BIDDING PROCEEDINGS
GENERAL PROCEDURES

47 C.F.R. § 1.2104 (1996)

§ 1.2104 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Reservation Price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) *Minimum Bid Increments.* The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish suggested minimum opening bids on a service-specific basis.

(e) *Stopping Rules.* The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) *Activity Rules.* The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) *Withdrawal, Default and Disqualification Penalties.* As specified below, when the Commission conducts a simultaneous multiple round auction pursuant to § 1.2103, the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any up-front payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (g)(1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any up-front payments or down payments that the defaulting or disqualified bidder has deposited with the Commission. When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(h) The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to

withhold the identity of the bidders associated with bidder identification numbers.

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.